Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA, *EX REL.*
JAMES M. HAGOOD,

Petitioner,

vs.

SONOMA COUNTY WATER AGENCY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. For the public disclosure of allegations or transactions to serve as a jurisdictional bar under 31 U.S.C. § 3730(e)(4)(A) of the False Claims Act, is it necessary to establish that the suit brought by the qui tam relator was based upon that public disclosure in whole or in part?

2. For the public disclosure to serve as a jurisdictional bar under 31 U.S.C. § 3730(e)(4)(A) of the False Claims Act, is it necessary to establish that the public disclosure included an actual allegation of fraud or fraudulent misconduct under the False Claims Act?

3. For a public disclosure within an administrative hearing to serve as a jurisdictional bar under 31 U.S.C. § 3730(e)(4)(A) of the False Claims Act, is it necessary that the administrative proceeding be of such a type that would allow it the substantive power to issue a remedy that would redress fraud or fraudulent transactions?

4. If the public disclosure of allegations or transactions occurs from the news media, is that disclosure subject to the qualifications of 31 U.S.C. § 3730(e)(4) if it is to serve as a jurisdictional bar under the False Claims Act?

5. Is a qui tam relator who has direct and independent knowledge of information disqualified from being considered an original source under 31 U.S.C. § 3730(e)(4) of the False Claims Act if another person or entity has publicly disclosed that information, in whole or in part, prior to the time the qui tam action was commenced?

6. In order to qualify as an original source under 31 U.S.C. § 3730(e)(4) of the False Claims Act, must the qui tam relator, in addition to having direct and independent knowledge of such information, have made an allegation concerning the information prior to a public disclosure of the allegations by another person or entity?

7. If a person or entity makes public disclosure of allegations or transactions, must a qui tam relator who has direct and independent knowledge of the information which is the subject of such allegations or transactions be a source to the person or entity making such disclosure in order to qualify as an original source under 31 U.S.C. § 3730(e)(4) of the False Claims Act?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to this proceeding are contained in the caption of the case: James M. Hagood and the Sonoma County Water Agency.

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Petition for Writ of Certiorari

Petitioner James M. Hagood respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 15, 1996. The decision by the Court of Appeals imposed a jurisdictional bar to Petitioner's qui tam action brought pursuant to the False Claims Act, 31 U.S.C. §§3729-3733. In so doing, the court of appeals applied jurisdictional standards that were contrary to the jurisdictional tests statutorily imposed by the False Claims Act, and in conflict with jurisdictional standards decreed in decisions of other United States courts of appeal. The conflict existing between the jurisdictional rulings in the present case and those that have been promulgated by other United States courts of appeal is sharpened by the fact that there is significant, unresolved conflict

within those courts on the jurisdictional standards applied to cases brought under the False Claims Act.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Hagood v. Sonoma County Water Agency,* 81 F.3d 1465 (9th Cir. 1996). It appears in the Appendix hereto at A-1.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on April 15, 1996. Jurisdiction is conferred on the United States Supreme Court to review the judgment on a writ of certiorari by 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutory provisions involved are contained in the False Claims Act, 31 U.S.C. §§3729-3733, and the Water Supply Act of 1958, 43 U.S.C. §390b. The False Claims Act is set out in the Supplemental Appendix hereto beginning at SA-23[1] and the Water Supply Act of 1958 can be found at SA-34.[2]

STATEMENT OF THE CASE

This case is a qui tam action brought by Mr. Hagood against Sonoma County Water Agency (Sonoma) under the False Claims Act. The suit concerns Sonoma's fraudulent failure to repay the United States government for its share of the construction and

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[1] The provisions applicable to this case are those that were applicable on March 22, 1988, the date Mr. Hagood commenced this litigation. It is that version of the Act that is included in the Supplemental Appendix.

[2] The Supplemental Appendix contains the 1982 version of the Water Supply Act, the version used by the court of appeals in its decision.

operating costs of the Warm Springs Dam as required by the Water Supply Act of 1958. Petitioner's claim for fraudulent failure to repay was dismissed by the district court for lack of subject matter jurisdiction and the dismissal was upheld by the Ninth Circuit Court of Appeals. As will be explained herein, the dismissal was ordered upon the reasoning that Mr. Hagood's repayment claim was based upon the public disclosure of allegations or transactions in another proceeding and in a newspaper article. Further, the court found that Mr. Hagood did not qualify as an original source of the information so as to exempt his claim from the "public disclosure" jurisdictional bar.

Warm Springs Dam is located 65 miles north of San Francisco, California, and was built for water supply, recreation, and flood control purposes by the United States Army Corps of Engineers. The Sonoma County Water Agency served as the local sponsor of the project in anticipation of the direct economic benefits it was to receive from the enhanced water supply capacity it could deliver to its burgeoning municipal, industrial, and agricultural users. Sonoma thereby became legally obligated under the Water Supply Act to repay its equitable share of the construction and operating costs and to make those repayments at times and upon terms specifically detailed in that statute. Thus, Sonoma's statutory obligations had two principal features: a cost allocation component based upon the benefits Sonoma obtained from the overall construction project, and repayment terms designed to protect the interests of the United States treasury. The repayment terms included a "trigger" date upon which repayments were to commence (first use), strict limits upon the period of time that interest charges could be waived (first use or ten years, whichever may be shorter), and a limit on the maximum number of years for the term of the federal loan (50 years after the project is first used for the storage of water for water supply purposes).

Based upon circumstances explained hereinafter, Petitioner—during an investigation he conducted as a private citizen

following his resignation from the Corps of Engineers—obtained information that Respondent Sonoma County Water Agency was fraudulently depriving the United States of the repayments required by the Water Supply Act. Through counsel, he sent a letter on February 19, 1988, to the Attorney General of the United States stating he had documents and information demonstrating that the repayment obligation had been reduced through false statements and false records, and that there had been a total absence of repayments.

Although the letter invited the Attorney General to review Mr. Hagood's documents and information, the offer was not accepted. Accordingly, pursuant to 31 U.S.C. §3730(b), Mr. Hagood began this suit under the False Claims Act for himself and for the United States on March 22, 1988, by filing his civil complaint under seal with the United States District Court for the Northern District of California. A copy of the complaint was provided to the government in camera as is required by that statute. Jurisdiction was conferred on the United States District Court for the Northern District of California by 31 U.S.C. §§3729-3733, particularly §3730 and §3732. The United States elected not to proceed on its own behalf, and the suit continued against the Sonoma County Water Agency with Mr. Hagood, the qui tam relator, as the sole plaintiff.

In the district court proceedings, Petitioner presented two basic claims under the False Claims Act, charging Sonoma with fraudulent avoidance regarding both features of its obligations under the Water Supply Act: 1) The Cost Allocation Claim. Sonoma had presented false information to reduce its cost allocation component, a percentage allocation that should have been based upon the benefits received from the project; 2) The Repayment Claim. Sonoma had used false information and concealed other information to avoid the terms of repayment required under the Water Supply Act a) by fraudulently failing to make payments to the federal treasury in spite of the fact that the "trigger date" (first use) had occurred, and b) by attempting to

reduce and conceal its repayment obligations through the use of a fraudulently negotiated contract with the Corps of Engineers. Petitioner alleged that the contract with the Corps of Engineers was explicitly in violation of the provisions of the Water Supply Act, thereby depriving the federal treasury of principal and interest payments which Sonoma was obligated to make. As to both the cost allocation claim and the repayment claim, the violations of the False Claims Act occurred when Sonoma failed to pay upon the trigger date of "first use."[3]

On September 25, 1989, the district court dismissed Mr. Hagood's third amended complaint with prejudice for failure to state a claim upon which relief could be granted.[4] He appealed to the Ninth Circuit Court of Appeals in what was to become the first of two visits to that court.

The court of appeals ruled on April 2, 1991. *U.S. ex rel. Hagood v. Sonoma County Water Agency,* 929 F.2d 1416 (9th Cir. 1991) [*Hagood I*].[5] The court upheld Mr. Hagood's third amended complaint, reversing the district court's dismissal. *Id.* at 1422. Moreover, and particularly germane to this petition, the panel for the Ninth Circuit Court of Appeals in *Hagood I* determined that the district court had subject matter jurisdiction.

After remand, the motion practice continued. On May 11, 1995, the district court granted Sonoma's motion for summary judgment and dismissed the entire case with prejudice.[6] The court held that Mr. Hagood had not prevailed factually on the

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[3] See 31 U.S.C. §§3729(a) and 3731(b).

[4] The district court's memorandum opinion is included in the Supplemental Appendix, beginning at SA-13.

[5] The Ninth Circuit opinion is reprinted in the Supplemental Appendix beginning at SA-1.

[6] The district court's order granting defendant's motion for summary judgment is included in the Appendix commencing at A-30.

cost allocation claim. As to the repayment claim,[7] the court dismissed it for want of subject matter jurisdiction, even though the Ninth Circuit Court of Appeals had determined in 1991 that subject matter jurisdiction existed in *Hagood I.*

Mr. Hagood again appealed to the Ninth Circuit Court of Appeals. The court ruled on April 15, 1996, in favor of Sonoma, upholding the district court's dismissal with prejudice. *Hagood v. Sonoma County Water Agency,* 81 F.3d 1465 (9th Cir. 1996) [*Hagood II*].[8] The court of appeals found that subject matter jurisdiction existed for the cost allocation claim, but determined there was an absence of material issues of fact demonstrating knowing fraudulent misconduct on the part of Sonoma in regard to the establishment of its cost allocation percentage for its loans on the construction project; summary judgment on the cost allocation claim was upheld. *Id.* at 1475-1479. With respect to the repayment claim, the court found that subject matter jurisdiction was absent to support the claim. *Id.* at 1472-1475. In reaching this decision on the repayment claim, the court of appeals improperly concluded that the "allegations or transactions" contained in Mr. Hagood's claim were "based upon" their public disclosure in an "administrative hearing" and in "the news media" pursuant to 31 U.S.C. § 3730(e)(3), and that Mr. Hagood was not an "original source" under 31 U.S.C. § 3730(e)(4).

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[7] The district court, as well as the circuit court of appeals in *Hagood II,* referred to Mr. Hagood's repayment claim as the "fixed repayment schedule" claim. This is a mischaracterization. The fixed repayment schedule was part of the amended contract of October 1, 1982, between the Sonoma County Water Agency and the Corps of Engineers. As explained later in this petition, the schedule purported to establish terms of repayment that, if followed, would have violated the Water Supply Act of 1958; the Act imposed, inter alia, specific requirements for trigger dates for repayment of principal and interest, and provided the maximum length of time for repayment. The gravamen of Mr. Hagood's repayment claim, therefore, concerns the failure to make payments in accordance with the mandatory provisions of the Water Supply Act, rather then the existence of the "fixed repayment schedule" in the October 1, 1982, amended contract.

[8] This opinion is reprinted in the Appendix beginning at A-1.

The review sought by this petition is limited to the dismissal of Mr. Hagood's repayment claim, and thus focuses on the issue of subject matter jurisdiction for actions brought by qui tam relators under the False Claims Act. It does not seek review of the decision by the court of appeals upholding the summary judgment entered against the cost allocation claim.

Petitioner is an attorney. Following his graduation from law school in 1970, he was hired by the U.S. Army Corps of Engineers (Corps). He was then assigned to the office of District Counsel located in San Francisco where he remained as Assistant Counsel until April of 1982. For reasons associated with his opposition to the terms and manner of repayment being negotiated between the Corps and Sonoma for the Warm Springs Dam project, he was informed that he was being transferred out of the San Francisco office to the office located in Sacramento. When he objected to the transfer, he was terminated by the Corps of Engineers. In July of 1982, Mr. Hagood accepted an offer from the Corps office in Alaska asking him to join its staff. In September of 1985, he moved to the Sacramento office where he stayed until he resigned from the Corps in March of 1987. Currently, he has a private law practice in Denver, Colorado.

Mr. Hagood's employment background is particularly germane to the issues presented by this petition in several respects. First, Mr. Hagood was not a government employee at the time he filed his case on March 22, 1988, nor when he conducted his investigation as a private citizen. Second, after he was terminated by the Corps in April of 1982, he performed no work in any capacity as an employee of the United States on the Warm Springs Dam project. Third, while he was employed as Assistant District Counsel in the Corps' San Francisco office, his job duties were those of a lawyer providing general legal services to the Corps. He was not assigned at any time during his employment with the United States to a position as a fraud investigator, an inspector, or a quality assurance specialist. He was, instead, one

of a number of lawyers in the Office of District Counsel providing general legal services to the Corps.

Mr. Hagood became involved with the Warm Springs Dam project while at the San Francisco office. The dam was to be constructed at the junction of two streams, Dry Creek and Warm Springs Creek, tributaries that flowed south into the Russian River, the principal water source in the Russian River drainage. The Corps and Sonoma first entered into a contract concerning the construction of the dam in 1964. The dam was to provide additional storage capacity within the drainage, allowing the stored water to flow down Dry Creek and into the Russian River. Sonoma installed large intake collectors (the Mirabel and Wohler collectors) south of the confluence and at about the point where the Russian River heads west into the Pacific Ocean. The intake collectors are large mechanical devices which pump water out of the river and divert it into an elaborate distribution system that services Sonoma's water customers.

The project expanded during its planning stage. The dam was originally designed with a total capacity of 277,000 acre feet of water, with 132,000 acre feet being devoted to Sonoma's water supply.[9] But Sonoma desired more water storage capacity for its use. The capacity was eventually increased to 381,000 acre feet, 212,000 acre feet being devoted to Sonoma's water storage pool alone.

On October 9, 1981, Mr. Hagood was asked to attend a meeting with Captain Scott Mosely (the Corps' Warm Springs Dam Project Coordinator and the individual in charge of negotiating the contract with Sonoma on behalf of the Corps) and Robert Beach (Sonoma's General Manager) to discuss changes to the contract proposed by Sonoma. During the meeting, Mr. Hagood expressed concerns over the repayment provisions of Sonoma's proposals.

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[9] One acre foot is that amount of water volume obtained by flooding an acre of land to a height of one foot.

Commencing with that October 9, 1981, meeting, Mr. Hagood stated his concerns with the contractual provisions; it was a course of action that ultimately resulted in his termination with the San Francisco office. Mr. Hagood had discussions with other members of the Corps staff following the first meeting with Mosely and Beach. On November 26, 1981, he sent a Memo for Record to Captain Mosely and Colonel Bazilwich, the Corps' District Engineer and Contracting Officer, retaining a copy for his own files.[10] Less than a week later, he followed the memo with another memorandum entitled "Disposition Form," dated November 30, 1981, in which he memorialized earlier discussions with supervisory personnel at the Corps informing them that, due to his opinion that the recommended repayment terms violated the Water Supply Act of 1958, he would not participate in the preparation of the amended contract.[11] Further, on March 25, 1982, he wrote a seven page letter to Colonel Bazilwich, wherein he again enumerated his objections to the proposed amended contract, explaining that, in spite of being ordered to do so, he would not participate in drafting the amended contract provisions.[12] After sending this letter, Mr. Hagood was told he was being transferred to the Sacramento office. After he objected, he was terminated by the Corps of Engineers.

Mr. Hagood presented his objections to the new contract proposals from the time he learned of them at the October 9, 1981, meeting. As the appended memoranda and letter demonstrate, Mr. Hagood explained that the repayment terms would

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[10] The Memo for Record was part of the record below (R. 630-633) and is a part of the Supplemental Appendix to this petition, commencing at SA-37.

[11] The Disposition Form was part of the record below (R. 636-637) and is included within the Supplemental Appendix to this petition, beginning at SA-42.

[12] The Bazilwich letter was part of the record below (R. 639-645) and is part of the Supplemental Appendix, commencing at SA-44.

violate the specific and mandatory provisions of the Water Supply Act of 1958. He objected because the proposals created a deferral of interest and principal contrary to the Act. He pointed out that the Act required repayment within a fifty year term, and that the proposed repayment schedule extended well beyond that period. Mr. Hagood protested the proposals' failure to abide by the Act's mandatory trigger dates of first use, and he objected to the fixed repayment schedule dates upon any basis other than the "first use" trigger date as being illegal and a violation of the Act. He took exception to the cost allocation which lowered the percentage of overall construction cost Sonoma would have to pay. He also explained that neither the Corps nor Sonoma had discretion to violate an express law of Congress.

Sonoma and the Corps proceeded to finalize an amended contract after Mr. Hagood was terminated, and it was signed October 1, 1982. While the final contract was structured to require repayment within a fifty year term, The contract had been divided into four separate "blocks" of water. Each block was given an artificial trigger date which meant that payments for each block, including the first, were to begin on a date contrary to the date required by the Act (first use). By fictitiously "breaking" the storage into four separate blocks, and by then moving the commencement date for repayment of principal and interest to a date in the future different from, and violative of, the trigger date in the Act, Sonoma was able to achieve the interest free use of money. Despite the fact that the dam had been built, that the federal treasury had paid for the construction costs, and that Sonoma would have made use of the water and received revenue from its customers, Sonoma would not have been paying either principal or interest to the government on its loan of almost $100 million. Thus, the amended contract was contrary to the provisions of the Act in the very areas that were the subject of Mr. Hagood's course of action taken from and after October 9, 1981: the repayment terms violated the Water Supply Act; the

trigger date for the Act was breached, and interest and principal were being deferred beyond the Act's requirements.

The federal government was being set up to get bilked. Sonoma's General Manager, Robert Beach, one of the individuals who attended the October 9, 1981, meeting, reported in a memorandum to the Sonoma County Administrator that, given the repayment terms that were negotiated, the present value of the Agency's repayment obligation was only $9,220,003.64. This result was achieved even though the Warm Springs Dam cost $312,000,000.00, and that Sonoma's share—even with the reduced cost allocation—was to be $96,624,900.00. In present value dollars, then, Sonoma would be paying less than 3% of the construction costs if the legally required trigger dates were ignored by Sonoma in favor of the artificial dates it negotiated with the Corps of Engineers.

The potential for harm to the government posed by the contract ultimately materialized. After the amended contract was signed, construction of the dam was completed. Its "plant in service" date, the date after construction was complete and the dam was capable of storing water, was November 1, 1984. When Mr. Hagood resigned from the Corps of Engineers in March of 1987, he began to investigate whether, in fact, use of the water by Sonoma had commenced. He personally went to the dam and saw that the dam was fully impounded with water and that water was being discharged into Dry Creek. Lest there be any question, he took pictures of the discharge and included them with the disclosure materials presented to the government when he filed his original complaint.

Concerned that the government was being denied money it was legally owed, Mr. Hagood, as a private citizen, submitted Freedom of Information Act requests to the U.S. Army and obtained eight responses; he went to the Sonoma County Water Agency to obtain any records reflecting that Sonoma had paid the federal government for the water that was being used; there were none. He went to the California Water Resources Control

Board to review water demand studies for the dam and learned that Sonoma had obtained a permit to appropriate water from the dam in 1986. He went to the United States Geological Survey to obtain stream flow data. First use had commenced by Sonoma more than a year before, yet payments were not being made to the federal treasury. Mr. Hagood commenced this suit under the False Claims Act because the harm threatened to the treasury by the amended contract had occurred as a result of the actions taken by Sonoma in direct violation of the Water Supply Act of 1958.

REASONS FOR GRANTING THE WRIT

This Court has not reviewed the jurisdictional standards to be applied to qui tam plaintiffs in the fifty three (53) years that have elapsed since enactment of the substantial amendments made in 1943 to the False Claims Act.[13] The 1943 legislation was passed in response to the Court's ruling in *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943). The 1943 amendments established jurisdictional barriers curtailing the ability of qui tam plaintiffs to prosecute cases under the Act. In 1986 Congress passed new legislation to strengthen the Act and expand its jurisdictional scope following Congressional hearings into reports of widespread contractor abuse and fraud.[14]

Because the court in *Hagood II* departed so significantly from the jurisdictional tests contained within the False Claims Act and those delineated by other circuit courts, Petitioner respectfully requests this Court to grant the writ. The reasons for granting the writ, however, extend beyond the parameters of

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[13] Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (codified as amended at 31 U.S.C. § 232 (1976).

[14] See *United States ex rel. S. Prawer & Co. v. Fleet Bank,* 24 F.3d 320, 324-26 (1st Cir. 1994) for a discussion of the history of amendments to the False Claims Act. *See also,* the dissenting opinion of Judge Scirica in *United States ex rel. Stinson v. Prudential Ins. Co.,* 944 F.2d 1149, 1162-68 (3rd Cir. 1991).

Mr. Hagood's case: the inter-circuit conflict is of such dimension that resolution by this Court is required to enable prospective plaintiffs and defendants alike, as well as district and appellate courts, to contend with the conflicting jurisdictional pronouncements.

The False Claims Act, as amended in 1986, contains its own jurisdictional standards. Germane to this case are those described in 31 U.S.C. § 3730(e)(4)(A) and (B). Because the False Claims Act is remedial legislation, the provisions of the statute, including the jurisdictional tests, must be construed "not technically and restrictively, but to flexibly effectuate its remedial purposes." *SEC v. Capital Gains Research Bureau,* 375 U.S. 180, 195 (1963); *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 549 (1943); *United States v. Neifert-White Co.,* 390 U.S. 228, 233 (1968).

The language of § 3730(e)(4)(A) [hereinafter (4)(A)] disallows cases based upon certain publicly disclosed allegations or transactions. This preclusion, however, is inapplicable to those qui tam plaintiffs who are "an original source." The language of § 3730(e)(4)(B) [hereinafter (4)(B)] defines the term "original source." The two provisions are found at SA-30.

In *Hagood II* the Ninth Circuit panel held that the public disclosure provisions of (4)(A) were applicable to this case. It then found Mr. Hagood did not qualify as "an original source" under (4)(B) to save his repayment claim from the bar of (4)(A). In both respects the court erred.

1. ANALYSIS UNDER THE PUBLIC DISCLOSURE REQUIREMENTS OF (4)(A).

The court of appeals in *Hagood II* held that there were two occurrences that constituted public disclosures under (4)(A): a proceeding before the Federal Energy Regulatory Commission (FERC) and an article that ran in a local newspaper. Each will be examined as against the jurisdictional tests contained in (4)(A) as they have been interpreted by courts of appeal.

a) *FERC PROCEEDING.* During the construction phase of Warm Springs Dam, the City of Ukiah (Ukiah) applied to the Federal Energy Regulatory Commission for a preliminary permit to study the feasibility of operating a hydropower facility at the dam under 16 U.S.C. § 798. Ukiah is located on the Russian River in Mendocino County just below Coyote Dam and north of the Warm Springs Dam. Through its application, Ukiah was attempting to obtain the benefits of the dam's hydropower potential.

Sonoma intervened in the FERC proceedings to oppose Ukiah's application for preliminary permit, and submitted its own application. FERC issued its initial decision in favor of Sonoma. Ukiah requested a rehearing on March 12, 1982. FERC upheld its original decision and rejected Ukiah's application on January 26, 1983. Ukiah appealed FERC's final decision, and the United States Court of Appeals for the District of Columbia Circuit affirmed the FERC ruling. *City of Ukiah, Cal. v. F.E.R.C.*, 729 F.2d 793 (D.C. Cir. 1984).

During the rehearing, Ukiah presented arguments to FERC countering Sonoma's contention that it was able to direct releases of water from the dam, a contention that Sonoma said was bolstered by the proposed contractual provisions being negotiated by the Corps of Engineers. Under those draft provisions, Sonoma said it would not be required to begin paying on the contract with the Corps if the releases were for non-consumptive (hydropower) purposes, and thus there would be no economic disincentive for hydropower releases to be made.

In this fashion, then, the proposals made by Sonoma to the Corps for an amended contract for Warm Springs Dam became a topic of the FERC proceedings. In the present case, Sonoma argued that Ukiah's contentions in the FERC proceedings rose to the level of a jurisdictionally precluding (4)(A) public disclosure. Sonoma presented documents from the FERC proceedings for the district court's consideration in Mr. Hagood's case during

the summary judgment proceedings in 1995, including two letters written by Ukiah's counsel to the Corps of Engineers in July of 1982 which complained about the draft proposals then under consideration. The first letter was dated July 1, 1982; it is included in Petitioner's Supplemental Appendix commencing at SA-55. The second letter was dated July 9, 1982.

In presenting these letters to the district court below, Sonoma's counsel represented they had been first presented in the FERC proceedings by Ukiah on July 12, 1982. Based upon the record below, these letters represent the first time Ukiah's contentions concerning the draft contract proposals were introduced into the FERC proceedings, i.e. mid-July of 1982. The court of appeals in *Hagood II* quoted from these July, 1982, letters in concluding that the Ukiah letters served as a qualifying public disclosure under (4)(A) that jurisdictionally barred Mr. Hagood's repayment claim.[15]

The Ukiah letters are important to the extent they may be considered public disclosures under the provisions of (4)(A). The public disclosure conditions of the False Claim Act obtain their context from the history of the Act as it has been interpreted and amended over the past five decades. In 1943 this Court decided *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943). The Court held that even if a qui tam relator's case was entirely dependent on the government's investigation, the Act preserved his right to sue. *Id.* at 545-48.

Congress responded to the Marcus decision with the 1943 amendments to the Act. The amendments provided, inter alia, that an individual's qui tam action would be dismissed if the government possessed any knowledge of the fraud when the suit was filed. The amendments significantly curtailed the ability of a qui tam plaintiff to maintain an action under the False Claims Act.[16] *United States ex rel. Wisconsin v. Dean,* 729 F.2d 1100, 1103

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[15] See footnote 14 in *Hagood II* at 1474.

[16] See footnote 14.

(7th Cir. 1984). Thus, Congress again responded in 1986 to correct its overreaction in 1943. The explicit purpose of the 1986 amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S.Rep. No. 345, 99th Cong., 2d Sess., at 1, *reprinted in* 1986 U.S.C.C.A.N. at 5266. Faced with ever more sophisticated fraudulent activity, the drafters of the amendments came to the conclusion that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds. Accordingly, the Senate bill increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government." *Id.* at 1-2 and 5266-67, respectively.

Contrary to the decision in *Hagood II,* other courts of appeal have ruled in a manner consonant with both the statutory language and the statutory purpose of the 1986 amendments. The First Circuit Court of Appeals issued the most comprehensive opinion on the jurisdictional standards under the 1986 amendments, focusing on the interpretation to be given the "based upon allegations or transactions which are the subject of" language contained in 31 U.S.C. § 3730(e)(3). *United States ex rel. S. Prawer & Co. v. Fleet Bank, supra.* The court in *Hagood II* was presented with a companion provision [§ 3730(e)(4)] containing substantially the same language as (e)(3), with (e)(3) referring to allegations or transactions which are the subject of another proceeding and (e)(4) referring to allegations or transactions publicly disclosed in another proceeding.[17]

The defendants in *Fleet Bank* argued that there was an identity of issues between those raised in an earlier collection

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[17] The jurisdictional standards for the False Claims Act are contained in four subsections of 31 U.S.C. § 3730(e). Hagood II involved the interpretation of the fourth subsection of § 3730(e). Fleet Bank was concerned with the third subsection which is directed to previous suits in which the United States is a party. The relevant differences in the two sections are that subsection 3 refers to actions based upon allegations or transactions which are the subject of a proceeding whereas subsection 4 refers to actions based upon the public disclosure of allegations or transactions in a proceeding.

case and those presented in the qui tam case, including alleged fraudulent misconduct on the part of Fleet and other defendants. Thus, the defendants asserted that Prawer's qui tam action was based upon allegations or transactions which were part of the collection case.

In *Fleet Bank* the court stated that when presented with a facially ambiguous statute, as it found in this case, it "would look to the statute as a whole and the history of its enactment in order to glean congressional intent." *Id.* at 327. In doing so, the court concluded that "a primary objective of the 1986 amendments . . . was to encourage and provide incentives for the bringing of *qui tam* actions in *all but* the several circumstances delineated in § 3730(e)." *Id.*

The court determined that the 1986 amendments sought to prevent those qui tam actions that could be characterized as being "parasitic." In that regard it was important to look at the two separate cases to determine whether there was a "host/parasite relationship". *Id.*[18] The test enunciated by the court in *Fleet Bank* was straightforward: to determine whether the qui tam case was receiving support, advantage, or the like from the host case without giving any useful or proper return to the government. *Id.* at 327-28. In applying that test, the court held that the qui tam case was not parasitic of the FDIC collection case for two reasons: 1) the FDIC had not proceeded against the qui tam defendants for fraud or otherwise in the collection case and, thus, a remedy for potential fraud had not been sought in the collection case; 2) the FDIC could not have proceeded against *Fleet Bank* for fraud in the collection case. *Id.* at 328. Thus, in evaluating whether a jurisdictional bar should be imposed in a qui tam action, it is important to assess whether the earlier proceeding was actually presented with the charges of fraud, and

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[18] The importance of distinguishing between parasitic and non-parasitic qui tam actions has been discussed by other courts of appeal. *See, e.g., United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1511 (8th Cir. 1994), *cert. denied*, 115 S.Ct 2579.

whether that earlier proceeding had the substantive capacity to remedy the fraudulent activity and provide a return to the United States treasury.

The Court of Appeals for the District of Columbia Circuit reviewed the requirements of § 3730(e)(4) and reached a result consistent with *Fleet Bank's* attention to the substance of the "allegations or transactions" concerning fraud. *United States ex rel. Springfield Terminal Ry. v. Quinn,* 14 F.3d 645 (D.C. Cir. 1994). The court concluded as follows: "The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain." *Id.* at 654.[19]

Before examining the court's decision in *Hagood II* against the jurisdictional standards established by other courts of appeal, one additional aspect of the (4)(A) language requires examination, namely the "based upon" criterion. The statute by its terms will bar qui tam actions that are "based upon the public disclosure of allegations or transactions in a [proceeding] . . . ," unless one can be considered an original source. In interpreting this statute, the Ninth Circuit Court of Appeals has held that *each* of four elements must be present to defeat jurisdiction: public disclosure; of allegations or transactions; in a proceeding; "and *the relator's action is 'based upon' that public disclosure.*" *United States ex rel. Lindenthal v. General Dynamics Corp.,* 61 F.3d 1402, 1409 (9th Cir. 1995) [emphasis supplied]. The statute itself is quite clear in that it does not refer to the relator's qui tam suit being based upon "similar allegations or transactions publicly

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[19] A decision by the Court of Appeals for the Ninth Circuit stated that it looked to the publicly disclosed allegations to determine whether they alleged or revealed "the factual predicates of fraud". *United States ex rel. Lindenthal v. General Dynamics Corp.,* 61 F.3d 1402, 1410 (9th Cir. 1995). The Eighth Circuit Court of Appeals has described the inquiry as follows: " . . . when the essential elements comprising that fraudulent activity have been publicly disclosed so as to raise a reasonable inference of fraud." *United States ex rel. Rabushka v. Crane Co., supra,* at 1514.

disclosed in a [proceeding]." Rather the statute specifically requires that the action be "based upon the public disclosure . . . " before a bar will be imposed. Thus, it is insufficient under (4)(A) to find that there is an identity between the allegations contained in the qui tam suit and those contained in the publicly disclosed information. Instead, it is necessary to show a connection between the suit and the disclosure, thereby demonstrating that the suit was "based upon" the disclosure itself.[20]

When examined against jurisdictional standards established by other courts of appeal, the court's decision in *Hagood II* places an interpretation on the language of (4)(A) that conflicts with the more reasoned decisions of other appellate courts. Furthermore, the decision—by establishing unwarranted jurisdictional burdens on qui tam actions—is contrary to the remedial purposes sought by the 1986 amendments. The Ninth Circuit's analysis of the FERC proceeding is flawed in three respects:

First, the FERC proceeding was never presented with an allegation by Ukiah or anyone else that Sonoma had committed fraud. Neither the July 1, 1982, letter nor the July 9, 1982, letter makes such a charge. The court in *Hagood II* concluded that "Ukiah *all but accused* the Water Agency of fraud in its letters to the Corps, which it also filed with the FERC." *Id.* at 1474 [emphasis supplied]. Such a standard, however, is in conflict with the clear language of the statute which expressly requires an "allegation." It is in conflict with the pronouncement in *United States ex rel. Springfield Terminal Ry. v. Quinn, supra,* which requires the allegation or the critical elements of fraud to be

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[20] In interpreting the "based upon" requirement of (4)(A), a number of appellate courts have held that the requirement is satisfied if the qui tam case is based in any part on the publicly disclosed information. *United States ex rel. Kreindler & Kriendler v. United Technologies Corp.,* 985 F.2d 1148, 1158 (2d. Cir. 1993), *cert. denied,* 113 S.Ct 2962; *Federal Recovery Services, Inc. v. U.S.,* 72 F.3d 447, 451 (5th Cir. 1995); *United States ex rel. Precision Co. v. Koch Industries,* 971 F.2d 548, 552-3 (10th Cir. 1992), *cert. denied,* 113 S.Ct 1364 (1993); *Cooper v. Blue Cross and Blue Shield of Florida Inc.,* 19 F.3d 562, 567 (11th Cir. 1994).

presented; it is in conflict with *Fleet Bank* because the charges of fraud were never presented and, accordingly, there was no opportunity to act on the charges. Moreover, the court in *Hagood II* contradicted its own rationale later in the opinion when it stated: " . . . an issue need not be decided in prior litigation for the public disclosure bar to be triggered; rather, its mere disclosure suffices." *Id.* at 1474. Yet, in this case, no allegation of fraud was disclosed within the FERC proceeding.

Second, the FERC proceeding did not have the substantive capacity to remedy the fraudulent activity and provide a return to the United States treasury even if the allegation of fraud had been made. The matter before the Federal Energy Regulatory Commission concerned the propriety of awarding a preliminary permit to two competing applicants for a hydropower study. The regulations of the Commission imposed limits on the scope of the Commission's review, constraining it to award the permit to the first-filed applicant unless a competing applicant could demonstrate a more comprehensive water development plan. 18 C.F.R. § 4.33(g) (1983).

FERC could do no more than deny both permits, or grant one and deny the other. The Corps of Engineers was not a party to the proceeding and, thus, FERC was unable to make a ruling which would have had binding effect on the Corps. The court in *Ukiah* emphasized that fact in commenting that the Corps "has no official interest in this proceeding." *Id.* at 800. FERC could not have invalidated the contract; it could not have made a determination of fraudulent conduct and it could not have assessed a fine or civil award against Sonoma. Additionally, the FERC proceeding occurred more than a year before Sonoma actually committed the actionable misconduct under the False Claims Act when it began its diversions of water from the dam without paying the federal treasury as required by the Water Supply Act of 1958. Thus, the FERC proceeding did not constitute a substantive forum as required by *Fleet Bank*.

Finally, Mr. Hagood's qui tam action was not "based upon" the public disclosure of any matters contained in the FERC proceedings. *Lindenthal* specifically required each of the four elements under (4)(A) to be established, including that "the relator's action is 'based upon' that public disclosure." *Lindenthal, supra,* at 1409. Mr. Hagood had commenced his own investigation almost eight months before the letters had been written. He had been terminated by the Corps of Engineers for his opposition to the amended contract more than three months before the Ukiah letters were composed. The letters are pale in comparison to the statements and charges made by Mr. Hagood in the memoranda and correspondence he sent the Corps months earlier.

The court of appeals erred in finding that the FERC proceeding was a jurisdictional bar to Mr. Hagood's repayment claim under the provisions of §3730(e)(4)(A).

b) *NEWSPAPER ARTICLE.* The court of appeals in *Hagood II* also invoked (4)(A) based upon a newspaper article that was published in the Santa Rosa Press Democrat on October 3, 1982.[21] The article is best characterized as a local "booster" story congratulating people who negotiated the amended contract.

The court of appeals found that Petitioner's "claim now that the Water Agency did *in fact* begin using the water without making payments amounts to no more than a new factual assertion, which when 'fairly characterized . . . repeats what the public already knows." ' *Id.* Based on this reasoning, the court held that the requirements of (4)(A) were satisfied by the article.

Section 3730(e)(4)(A) includes public disclosures from the news media as one of the disclosures qualifying for review under (4)(A). But as with other sources of disclosure, the news media provision is incorporated within the overall subsection in context

[21] The article is included in Petitioner's Supplemental Appendix commencing at SA-60.

with the other provisions and qualifications of (4)(A). For the newspaper article to have served as a bar, therefore, it would have been necessary for the court of appeals to have found, as required by the specific language of (4)(A), that the qui tam action was "based upon the public disclosure of allegations or transactions . . . from the news media . . . "

The information contained in that article clearly did not constitute such a "disclosure." Fraud is not alleged in the article as would be required by *Fleet Bank, Lindenthal,* and *Springfield Terminal Ry.* To the contrary, the article pats people on the back, providing not the slightest hint of illegality, impropriety, or fraudulent misconduct. Likewise, there is no evidence that Mr. Hagood's qui tam case was based upon the article, nor could it have been since the qui tam action was based on allegations of fraudulent and illegal misconduct on the part of Sonoma and the article was devoted to laudatory coverage of a new and beneficial contract for the local community. See *United States ex rel. Lindenthal v. General Dynamics Corp., supra.*

The decision in *Hagood II* conflicts with the holding reached by the Eighth Circuit Court of Appeals dealing with the news media section of (4)(A). *United States ex rel. Rabushka v. Crane Co., supra.* In *Rabushka,* the court of appeals held that when evaluating whether a news article constitutes a "transaction" under (4)(A) "the bar is given effect when the essential elements comprising that fraudulent transaction have been publicly disclosed so as to raise a reasonable inference of fraud." *Id.* at 1514. In *Hagood II* the court of appeals did not subject the article in the Press Democrat to any fraud analysis, whether the test pronounced in *Rabushka* or any other similar test. In doing so, the court in *Hagood II* elevated public disclosures in the news media to a level higher than the public disclosures in other proceedings, freeing such public disclosures from the specific, limiting language Congress expressly included in (4)(A).

The court erred in finding that the newspaper article was a jurisdictional bar to Mr. Hagood's repayment claim.

2. ANALYSIS UNDER THE ORIGINAL SOURCE EXCEPTION OF (4)(B).

After holding that Mr. Hagood's repayment claim was covered by the public disclosure provisions of (4)(A), the court in *Hagood II* then found he was not "an original source" under (4)(B), a classification that exempts a qui tam suit from the jurisdictional bar. The court based its decision on three reasons.

First, the court stated that Mr. Hagood had not alleged in his memoranda and letter "that the Water Agency and the Corps had negotiated a repayment contract that allowed the Water Agency to begin using water before it began paying for it." *Id.* at 1475. Had he done so, "he would have been in a better position to bring this claim." *Id.* at 1475. The court was incorrect.

The November 26, 1981, memorandum, the November 30, 1981, memorandum, and the letter of March 25, 1982, addressed the proposed changes to the contract. The proposals established an artificial trigger date of 1993 for the commencement of payments under the contract as distinguished from 1983, the date that both the Corps and Sonoma believed first use for water storage purposes (the actual trigger date under the Water Supply Act of 1958) would commence. [22] First use for purposes of the Water Supply Act was the date the dam was first used for water storage purposes. That fact was stated on the first page of Mr. Hagood's first memorandum, and its import was emphasized by the fact that he even quoted the statutory language.

By structuring the repayment schedule with an artificial commencement date of 1993, Sonoma and the Corps were proposing an arrangement which would excuse payment during the first ten years. Thus, the schedule itself created a payment hiatus. Mr. Hagood repeatedly mentioned that the statute defined first use as the triggering date, and he quoted the statute on multiple occasions to alleviate any doubt. The documents further pointed

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[22] See, for example, the last sentence of paragraph 1a on page 6 of Mr. Hagood's March 25, 1982, letter. It is at SA-51-2.

out that such a repayment schedule—placing commencement at the artificial date of 1993 rather than 1983—would extend the ultimate payout beyond the 50 year maximum term allowed by the Water Supply Act.

The court's second rationale for finding that Mr. Hagood was not "an original source" has precedential unsoundness extending beyond the parameters of his case. Quoting from the Ninth Circuit's opinion in *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992), the court held that a person cannot bring a qui tam action if the relator republishes an allegation that has already been publicly disclosed even if that person has direct and independent knowledge of the fraud. *Hagood II* at 1475.

The ruling, if permitted to stand, nullifies the "original source" exception to the (4)(A) jurisdictional bar. Even if we were to assume, arguendo, that Mr. Hagood's qui tam action republished allegations that had already been publicly disclosed,[23] he would still be statutorily entitled to demonstrate that he was "an original source." In doing so, his case would be immunized from the jurisdictional bar pursuant to specific Congressional enactment. The word "unless" in (4)(A) simply cannot be erased, nor can the definition of "original source" in (4)(B) as one "who has direct and independent knowledge" be viewed as statutory surplusage. Neither the court of appeals in *Hagood II* nor the court of appeals in *Wang* has the authority to ignore the statutory exception created by Congress.

The "original source" exception has been recognized by courts of appeal, and none, other than the courts in *Hagood II*

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[23] Mr. Hagood, of course, has contended that his qui tam suit is not based upon the public disclosure of allegations or transactions made in the FERC proceeding nor in the Press Democrat article, nor could it have been since neither the proceeding nor the article concerned allegations of fraud. That discussion is the subject of the (4)(A) analysis above.

and *Wang*, has promulgated a judicial rule nullifying the exception instituted by Congress.[24] In applying the "direct and independent knowledge" test, the Court of Appeals for the Seventh Circuit has looked to whether there is evidence that the qui tam relator would have learned the information absent public disclosure. *Houck on Behalf of the United States v. Folding Carton Admin.*, 881 F.2d 494, 505 (7th Cir. 1989), *cert. denied*, 494 U.S. 1025. The Court of Appeals for the Eleventh Circuit has held that a person qualifies as an original source, satisfying the direct and independent components contained in the definition, if the person had some of the information in advance of the public disclosure. *Cooper v. Blue Cross and Blue Shield of Florida, supra. See also, United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 499 U.S. 921.

The third rationale used by the court in *Hagood II* in finding that Mr. Hagood was not an original source, like the second rationale, substantially undermines the remedial purposes to be achieved by the False Claims Act. The court held that Mr. Hagood could not qualify as an original source in regard to the Ukiah allegations in the FERC proceedings because he had not demonstrated he was an original source to Ukiah:

> Hagood has made no showing that Ukiah's knowledge of the repayment schedule or allegations of its illegality stemmed in any way from Hagood's internal complaints about the contract. Indeed, Hagood's internal complaints in 1981 and 1982 did not mention the fixed repayment schedule issue. Therefore, he was not an original source of this disclosure.
> — *Hagood II* at 1474

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[24] Another decision reached a result similar to that of *Hagood II* and *Wang*. The Second Circuit Court of Appeals has held that "[p]ublic disclosure of the allegations divests district courts of jurisdiction over *qui tam* suits, regardless of where the relator obtained his information." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992).

In regard to the court's assertion that Mr. Hagood had not mentioned the fixed repayment schedule in his internal complaints, Petitioner has discussed this issue earlier in this petition. Please see the discussion in footnote 7 on page 6 of this petition, as well as the discussion concerning the proposed changes at pages 9-11 and 23-24 of this petition. The memoranda and correspondence are replete with his criticisms of the structure of the repayment provisions of the contract proposals, as well s other aspects of the repayment provisions that were illegal. It deserves emphasis again (*see* footnote 7) to mention that Mr. Hagood's repayment claim makes allegations of fraudulent misconduct on the part of Sonoma that include, but that are in no way limited to, his allegations concerning the repayment schedule. Yet, had that not been the case, and had Mr. Hagood made no complaints concerning the repayment schedule and had he made no allegations concerning any part of the repayment terms, he would still not be divested from qualifying as an original source. 31 U.S.C. § 3730(e)(4)(B) defines that phrase, and nowhere in the definition is there a requirement that the qui tam relator demonstrate that he or she made allegations prior to any allegations by any other person or entity. Instead, the statute provides that one is to be deemed an original source if such person has direct and independent knowledge of the information, and if the information is voluntarily provided the government before filing suit. Not only was the court incorrect in claiming that Mr. Hagood had not made allegations in his internal complaints concerning the fixed repayment schedule, but it also imposed a requirement that is not imposed by the statute. Congress was empowered to define the requisite qualifications for original sources. It did so in (4)(B). The Ninth Circuit Court of Appeals cannot legislate an additional qualification.

In regard to the court's assertion that Mr. Hagood was not a source of Ukiah's disclosure, here again, the court of appeals in *Hagood II* has imposed a limitation upon original source status that was not legislated by Congress. Nowhere within the provisions of (4)(B) is there a requirement that the qui tam relator be

a source to the publicly disclosing party. To the contrary, the statute specifically requires that the relator have direct and independent knowledge of the information.

The courts of appeal are in conflict on this issue, the Second Circuit holding that one must be "a source to the entity that publicly disclosed the allegations," and the Ninth Circuit holding that the relator must demonstrate that he or she "played some part, whether direct or indirect, in the public disclosure." *United States ex rel. Dick v. Long Island Lighting Co.,* 912 F.2d 13, 16 (2d Cir. 1990); *United States ex rel. Barajas v. Northrop Corp.,* 5 F.3d 407, 411 (9th Cir. 1993), *cert denied,* 114 S.Ct. 1543. This standard was explicitly rejected by the Fourth Circuit Court of Appeals, holding that § 3730(e)(4)(A) " . . . unambiguously does not require, as the Second Circuit has held that it does, that a relator be a source to the original disclosing entity in order to be an 'original source.' " *United States ex rel. Siller v. Becton Dickinson & Co..,* 21 F.3d 1339, 1351 (4th Cir. 1994), *cert. denied,* 115 S.Ct. 316.

The central requirement imposed by Congress for one to be deemed an original source is the direct and independent knowledge test. It is this test, rather than additional tests imposed by courts of appeal, that is controlling. The Court of Appeals for the Eighth Circuit summarized the direct and independent knowledge test as follows:

> . . . A relator is said to have direct knowledge of fraud when he "saw [it] with his own eyes." *Id.* The direct knowledge requirement was intended to avoid parasitic lawsuits by "disinterested outsider(s)" who "simply stumble across an interesting court file." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Provident Life & Accident Ins. Co.,* 721 F.Supp. 1247, 1258 (S.D.Fla. 1989) *(Provident).* Instead, the Act seeks to encourage persons with *"first-hand* knowledge of fraudulent misconduct," *Prudential,* 944 F.2d at 1154 (emphasis added), or those "who are either *close*

observers or otherwise involved in the fraudulent activity" to come forward. *U.S. Ex Rel. Barth v. Ridgedale Elec., Inc.,* 44 F.3d 699, 703 (8th Cir. 1995)

Other courts of appeal have interpreted the meaning to be given the words "direct" and "independent," thereby emphasizing the importance of the original source exception to the jurisdictional bar. The Court of Appeals for the District of Columbia Circuit, for instance, has held that direct " . . . signifies 'marked by absence of an intervening agency' . . . " and independent knowledge " . . . is knowledge that is not itself dependent on public disclosure." *United States ex rel. Springfield Terminal Ry. v. Quinn, supra,* at 656. Whereas the court in *Hagood II* effectively eliminated original source as an exception to the jurisdictional bar, arguing that Mr. Hagood was merely republishing allegations already in the public domain, the court in *Springfield Terminal Ry.* held that "direct and independent knowledge . . . refers to direct and independent knowledge of any essential element of the underlying fraud transaction." *Id.* at 657. This approach was also followed by the Fifth Circuit Court of Appeals when it determined that the qui tam relator did not qualify as an original source, but this determination was reached only after the court found that the relator had no direct and independent knowledge of any of the publicly disclosed information. *Gold v. Morrison-Knudsen Co.,* 68 F.3d 1475, 1477-78 (2d Cir. 1995). [25]

In regard to Mr. Hagood, there can be no doubt he had "direct and independent knowledge." His involvement was the first. His complaints concerning the proposed repayment terms were detailed at length in his memoranda and correspondence that followed the meeting of October 9, 1981, in which he first

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[25] The Third Circuit Court of Appeals has required that "the relator must possess substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation." *United States ex rel. Stinson v. Prudential Ins., supra,* at 1160.

voiced his opposition. He was, in fact, terminated after opposing the contract proposals, and had been out of work as a consequence thereof for more than three months before the letters upon which Sonoma relies were even written. His "direct and independent knowledge" extended further: upon his ultimate resignation from the Corps in the spring of 1987, he went to the dam site, personally observed the operations of the dam and the water diversions from it, and took pictures to memorialize his observations. He went to state and federal offices to obtain information about Sonoma's water usage. He went to Sonoma to find evidence of any payment, and found none. He wrote the Attorney General of the United States to inform him of his investigation and to solicit the Attorney General's own inquiry. When no action was taken, suit was filed.

It was error for the court of appeals to nullify the original source exception and to jurisdictionally bar Mr. Hagood's repayment claim.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in dismissing Petitioner's repayment claim.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES M. HAGOOD, *Plaintiff-Appellant,* v. SONOMA COUNTY WATER AGENCY, *Defendant-Appellee.*	No. 95-16092 D.C. No. CV-88-00991-CW OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
February 15, 1996—San Francisco, California

Filed April 15, 1996

Before: Procter Hug, Jr., Chief Judge, Joseph T. Sneed and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Sneed;
Concurrence by Judge Kleinfeld

OPINION

SNEED, Circuit Judge:

This is an appeal by qui tam plaintiff James M. Hagood from the district court's grant of summary judgment in favor of the Sonoma County Water Agency in his action under the False Claims Act, 31 U.S.C. §§ 3729-3733.[1] Hagood's action has its source in the construction of the Warm Springs Dam on Dry Creek, a tributary of the Russian River in northern California, and a 1982 amended contract by which the Sonoma County Water Agency ("the Water Agency") agreed to repay the United States for the water supply component of the cost of building the dam. Thus, Hagood's action is a "reverse false claim": he alleges not that the Water Agency fraudulently overbilled the United States, but that it fraudulently induced the United States to underbill it. Hagood contends on appeal that the district court erred by (1) finding that it lacked subject matter jurisdiction over his claim concerning the fixed repayment schedule; and (2) granting summary judgment in favor of the Water Agency on his cost allocation claim. The Water Agency submits that the district court lacked subject matter jurisdiction over both claims.

This is Hagood's second trip to this court. On his first trip, we held that his complaint stated a claim under the False Claims Act, and reversed the district court's 12(b)(6) dismissal. *United States ex rel. Hagood v. Sonoma County Water Agency,* 929 F.2d

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[1] The False Claims Act provides for the recovery of civil penalties from those who knowingly present a false or fraudulent claim to the federal government for payment, or knowingly use a false record to avoid or decrease an obligation to pay the federal government. 31 U.S.C. § 3729(a)(1),(7). The Act's qui tam provisions allow an individual to bring a civil action on behalf of himself as well as the government, and to share in any penalty recovered. *Id.* § 3730(b),(d). The Act was first enacted in 1863 "in order to combat rampant fraud in Civil War defense contracts." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. It was substantially amended and strengthened in 1986 because of rising government fraud, especially in the areas of defense contracting and health care benefits. *Id.* at 2-4, 1986 U.S.C.C.A.N. at 5267-69.

1416 (9th Cir. 1991). This time, with more evidence in hand, we hold him to the higher standard required to survive summary judgment.

The district court had jurisdiction under 31 U.S.C. §§ 3729-3733, unless the claims were barred under 31 U.S.C. § 3730(e)(4), a disputed issue on appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291. We now affirm the grant of summary judgment.

I.

BACKGROUND OF HAGOOD'S CLAIMS

It all began when Congress authorized construction of the Warm Springs Dam by the United States Army Corps of Engineers ("the Corps") in the Flood Control Act of 1962, Pub.L. 87-874, 76 Stat. 1180. The project's authorized purposes were flood control, recreation, and water supply. To the latter purpose a storage capacity of 132,000 acre-feet[2] was allocated. Under the Water Supply Act of 1958, 43 U.S.C. §390b, the local interests who benefit from the water supply component of federal projects, such as Warm Springs, are to shoulder the portion of construction costs allocated to that purpose.[3] Costs allocated to federal purposes like flood control and recreation are to be borne by the federal government. The local sponsor for the Warm Springs project was the Sonoma County Flood Control & Water Conservation District, later renamed the Sonoma County Water Agency.

Accordingly, in 1964 the Water Agency signed a contract with the Corps to use and repay the cost of water supply storage

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[2] An acre-foot is the volume of water that covers an area of one acre to a depth of one foot, about 43,560 cubic feet. *The American Heritage Dictionary* (3d ed. 1992).

[3] The Water Supply Act, before it was amended in 1986 by Pub.L. 99-662, Tit. IX, § 932(a), 100 Stat. 4196, stated in relevant part:

(footnote continues)

created by the Warm Springs Dam and its reservoir, Lake Sonoma. The contract defined three 44,000 acre-foot blocks of water storage space, use and repayment of which was to begin in 1979, 1985, and 1991, respectively. In the contract, the Corps allocated to water supply storage 30% of the total construction cost, or $12,433,500.

The Expanded Warm Springs Project

In 1967, before significant construction had begun, the Corps prepared a General Design Memorandum ("GDM") which envisioned an expanded Warm Springs Dam project with a water supply storage capacity of 212,000 acre-feet, an increase of 80,000 acre-feet. In the GDM, the Corps reevaluated the breakdown of costs and adjusted the cost allocation for water supply storage downward to 27.76%. Despite the lower allocation, a higher price tag of $20 million was assigned to water supply

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(footnote continued)

> In carrying out the policy set forth in this section, it is hereby provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water . . . : *Provided,* That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: *Provided further,* That before construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section: *And provided further,* That not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future demands where State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project[.]

43 U.S.C. § 390b(b). The water supply component of Warm Springs was entirely for future supply.

storage because of the project's expansion and rising construction costs.[4] The Corps asked for the Water Agency's assurances that it needed and would pay for the additional storage, and the Water Agency agreed. In 1969, the Corps approved the project "optimization" and reported it to Congress.

The Cost Allocation Question

In early 1974, while the dam was still under construction, the U.S. General Accounting Office conducted an inquiry into the Warm Springs project and concluded that delays in project completion called into question the validity of the cost allocation.[5] In response, the Corps acknowledged that delays and the increased storage space in the expanded project made a new cost allocation necessary, but explained that this would be performed when firm cost figures became available, "about four years from now." However, in a letter to the Water Agency later in 1974, the chief of the Corps' Engineering Division in San Francisco, H. E. Pape, Jr., wrote that "[t]he percentage of cost allocated to the water supply feature is 27.76% as established in the approved General Design Memorandum. This percentage will remain

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[4] This figure continued to grow as total costs grew, so that the cost finally estimated for water supply in the 1982 amended contract was $96,624,900.

[5] The GAO's regional manager, A. M. Clavelli. wrote to the Corps' district engineer in San Francisco, Col. James L. Lammie:

> Early in the project formulation during the 1960's, it was assumed the municipal and industrial water supply benefits would not be derived until about 10 years after the expected project completion in about 1970. Therefore, the benefits assigned to water supply were discounted at the project interest rate (3-1/8 percent) for a 10-year period. This in turn reduced the percentage and amount of project costs allocated to water supply: the only reimbursable project purpose.
>
> With the delays experienced, it now appears the initial use of water specified for in the contract will coincide with project completion at about the year 1980. In our opinion, the changed situation makes questionable the continued use of the premise upon which cost allocation was based.
>
> We believe you should consider reallocation of project costs based upon the current situation.

unchanged regardless of any changes made in the project's first [i.e. construction] cost."

The confusion over the cost allocation resurfaced several years later, when the Water Agency and the Corps began negotiating an amended contract to reflect the project's expansion. The primary negotiators were Robert F. Beach, General Manager of the Water Agency since 1980, and Capt. Scott Mosely of the Corps' San Francisco district. In April 1981, Capt. Mosely sought guidance from Corps headquarters on how to proceed in view of the project's expansion. In response, L. H. Blakey, Chief of the Planning Division at Corps headquarters, noted that "[a] new cost allocation is required," but that "[t]he above guidance cannot be taken as official Office, Chief of Engineers views."

Apparently, Mosely and Beach then agreed that Beach would submit a draft of the proposed amended contract, which Beach did on October 1, 1981. The draft included the 27.76% allocation and a handwritten figure of $122,018,700 for the cost allocated to water supply. In a cover letter, Beach pointed out that he had "included a cost estimate which you may wish to modify."

Mosely and Beach then met to discuss the draft in November 1981. Also at that meeting was appellant Hagood, who was an Assistant District Counsel in the Corps' San Francisco district and had been assigned the task of drafting the new contract. According to Hagood, he and Mosely went into the meeting with questions about the figures Beach had included in the draft. Beach responded by showing them the Pape letter:

> At that time, Mr. Beach pulled out a letter from Mr. Pape . . . Mr. Beach explained that the figures, the percentage figure that he was using in his contract, proposed contract, was the same figure that Henry Pape had sent to Mr. Beach's predecessor, Mr. Miller.

Mosely and Hagood, who had been unaware of this letter, told Beach they would "look into this."

When the two returned to San Francisco after the meeting, Hagood asked the engineering branch about the cost allocation. He was told by an assistant chief of engineering in the San Francisco district that a cost allocation would not be done for the enlarged project. Greatly concerned, Hagood wrote two file memos in November 1981, and a letter to the District Engineer, Colonel Paul Bazilwich, Jr., on March 25, 1981, opining that the Water Supply Act required "a new allocation based on accurate and current costs."[6] Hagood refused to participate in drafting the contract. According to Hagood,

> if a current and accurate cost allocation was performed, [the Water Agency's] repayment obligation would increase at least $60 million over its cost allocation based on the inaccurate 1967 GDM. Thus [the Water Agency's] cost share may be over $145 million rather than the approximately $86 million based on the 27% total repayment obligation.

Steve Lingenfelter, who was then District Counsel for the San Francisco District, wrote a memo to the file disputing Hagood's interpretation of the Water Supply Act and arguing:

> Colonel Bazilwich considered all staff comments regarding the cost allocation issue. It was ultimately his decision, after a thorough review and evaluation of all aspects of that issue, that preparation of a new cost allocation was not mandatory.

In April 1982, Hagood left the San Francisco District for Alaska; in 1987, he retired from the Corps.

The cost allocation controversy continued to percolate within the Corps, however. On September 13, 1982, James P. Oppenheim, Assistant Director of Civil Works, Pacific, wrote to the Commander of the Pacific Division that

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[6] Hagood also challenged the draft contract on other grounds that he does not pursue in this action. His second claim in this action, that the contract fails to tie commencement of repayment to the Water Agency's first use of the project, was not raised in his 1981 and 1982 correspondence.

> In accordance with paragraph 2-5b of ER 1105-2-40 [an internal Corps regulation], dated 8 January 1982, an updated preliminary cost allocation study is required. This cost allocation must be approved before an accompanying water storage contract can be submitted to the Secretary of the Army for approval . . . . Corps policy on this item . . . is to adjust contract costs to only reflect actual construction costs and not to reflect change in cost allocations.

On September 27, 1982, Edward M. Lee, Jr., who had replaced Colonel Bazilwich as District Engineer, wrote to the Commander of the South Pacific Division that "the cost allocation set forth in Table II of Exhibit 'A' to the executed contract is the current updated project cost allocation based upon the project and the authorized project purposes."

Finally, on September 30, 1982, the contract was forwarded for final Corps approval to Assistant Secretary of the Army William Gianelli, accompanied by a memo from Brigadier General Forrest T. Gay, III, who noted:

> Regulations require an updated preliminary cost allocation as a basis for this cost-sharing contract. The expedited schedule for review and approval of this contract directed by your office did not allow time for this new cost allocation to be developed.

Despite this observation, Gay recommended Gianelli sign the contract. On a "routing and transmittal slip" attached to the contract and memo, a handwritten note stated:

> Corps *policy* requires a preliminary cost allocation schedule to be prepared before contract is signed. This is not a legal necessity. It will take 3-6 months to develop a new schedule. Decision made by OCE [Office of Chief Engineer] staff to waive policy.

On October 1, Gianelli signed the contract.

The Fixed Repayment Schedule Question

While enlargement of the dam raised cost allocation issues, the possibility of conjunctively operating Lake Sonoma and another dam and reservoir upstream of Warm Springs raised repayment timing issues.[7] Coyote Dam and Lake Mendocino are located on the east fork of the Russian River above the confluence of Dry Creek with the river. Because the two facilities are part of the same river system, operating them conjunctively would, according to Water Agency correspondence on the issue, help "to maintain minimum flows in the Russian River and Dry Creek and to optimize beneficial uses of water for water supply, fish, wildlife and other purposes." Such conjunctive management would involve making some releases from Lake Sonoma that would ordinarily be made from Lake Mendocino, in order to maintain higher water levels in the latter.

In 1978, before negotiations on the amended contract began, the Water Agency and the California Department of Fish & Game ("Fish & Game") began exploring this possibility. Concerned that releasing water from Lake Sonoma under this scheme would prematurely trigger repayment on its Warm Springs Dam obligations, Gordon W. Miller, Beach's predecessor at the Water Agency, asked the Corps for its opinion. In response, John M. Adsit, then District Engineer in San Francisco, acknowledged the Water Agency's concern, and offered to circumvent the problem by performing a monthly "routing" of the river system. The idea behind the routing methodology was

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[7] The timing of repayments on the Water Agency's obligation was significant because of a provision of the Water Supply Act that stated:

> [T]he entire amount of the construction costs, including interest during construction, allocated to water supply shall be repaid within the life of the project but in no event to exceed fifty years after the project is first used for the storage of water for water supply purposes, except that (1) no payment need be made with respect to storage for future water supply *until such supply is first used* . . . .

43 U.S.C. § 390b(b) (emphasis added).

that repayment on the Warm Springs obligation would be triggered only when the "routing" showed that had the releases from Lake Sonoma been made instead from Lake Mendocino, the available water supply in Lake Mendocino would have been exhausted.[8] The parties agreed on the need for conjunctive management, but the routing methodology was soon abandoned as too complex. Yet, its introduction influenced the course of negotiations over the repayment terms in the new contract.

When the Water Agency and the Corps began negotiating the new contract in August 1980, the draft contract added a fourth block of 80,000 acre-feet to the three blocks in the original contract. Fixing the dates on which repayment for each block would begin was a major sticking point. This was because conjunctive operation of Lakes Sonoma and Mendocino made it difficult to determine when, absent conjunctive operation, actual first use of each block of water in Lake Sonoma would occur. The solution settled upon was to adopt fixed repayment start dates for each block which were, in turn, based on "triggering studies" prepared by the Water Agency to predict hypothetical dates of first use.[9] Thus, the repayment schedule, set forth in the

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[8] Adsit's letter stated in pertinent part:

> To see if existing supplies of water [in the Russian River] are adequate, the Corps will perform a monthly water supply routing of the Russian River system, assuming that Lake Sonoma was not in existence, at the end of every calendar year. When the routing indicates that Lake Mendocino would have been drawn down below the bottom of the water supply pool at the end of any month, [the Water Agency] will be directed to commence full repayment of costs associated with the first, or subsequent blocks of water from Lake Sonoma (as set forth in existing contracts).

[9] One of the Corps' lawyers proposed that repayment on a given block could begin earlier than the fixed date if an earlier actual first use were later determined. The Water Agency protested that given the complexity of determining when "first use" occurred, this solution too might inadvertently trigger repayment obligations. As an alternative, the Water Agency proposed to include a savings clause, to which the Corps' attorneys agreed. That clause in the final contract reads:

(footnote continues)

margin,[10] called for payments for the four blocks to commence in 1992, 1995, 2000, and 2005, respectively, regardless of when first use of each block actually began. The total water supply storage cost, including interest, of $96,624,900 was to be repaid by the year 2042, 50 years from the anticipated "plant-in-service" date of 1992.

Whether the adoption of fixed repayment start dates complied with the terms of the Water Supply Act was soon disputed both within the Corps and without. In 1980, while the contract negotiations were proceeding, the Water Agency had become involved in a dispute with the City of Ukiah ("Ukiah") over their competing applications to the Federal Energy Regulatory Commission ("FERC") for a preliminary permit to investigate the development of hydropower facilities at Warm Springs Dam. The FERC granted the permit to the Water Agency on the basis of its contract with the Corps, which allowed it to control releases from the Warm Springs Dam. Ukiah then submitted a petition for rehearing which alleged that the fixed repayment schedule in the proposed amended contract violated the Water Supply Act

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(footnote continued)

> The Government further reserves the right . . . to prohibit any withdrawals of water from the lake, or any releases through the outlet works that would cause the repayment provisions of this contract to be inconsistent with any provision of the Water Supply Act of 1958.

[10]

Date repayment begins	Block of water supply storage	Amount of repayment
1992	Block 1 (44,000 AF)	$16,831,889 (principal) $ 3,222,336 (interest)
1995	Block 2 (44,000 AF)	$16,831,889 (principal) $ 3,222,336 (interest)
2000	Block 3 (44,000 AF)	$16,831,889 (principal) $ 3,222,336 (interest)
2005	Block 4 (80,000 AF)	$31,603,434 (principal) $ 5,858,791 (interest)
Totals	212,000 AF	$96,624,900

because it decoupled commencement of repayment from actual first use of the water. This petition was denied and Ukiah then filed a petition for review in the D.C. Circuit Court of Appeals. In *City of Ukiah v. F.E.R.C.*, 729 F.2d 793, 799 (D.C. Cir. 1984), the D.C. Circuit held that "section 390b(b)(1) [of the Water Supply Act] does not require Sonoma to begin paying for its storage space when it releases water for nonconsumptive purposes, including power generation." The court declined to reach the question whether the same was true for consumptive purposes, including water supply. *Id.* at 797 n.12. The court noted, however, that Ukiah had argued both: "Ukiah also argues that the 1982 contract is illegal under the Water Supply Act because the contract separates Sonoma's repayment obligation from its use of water even for water supply purposes." *Id.*

Internal Corps memoranda from that time indicate confusion over precisely what the Water Supply Act required. The San Francisco district argued that the fixed repayment schedule was legal.[11] The legal office of the Corps headquarters apparently had questions about the schedule's legality up to the end. However, the addition of the savings clause around September 13 appeared to satisfy those concerns.[12] On October 1, Gianelli signed the contract.

The Role of Political Pressure

One final wrinkle in this tale must be told in order to understand Hagood's claims. In March 1982, Beach contacted the office of his representative, Congressman Claussen, to request help in shepherding the contract through the Corps' approval process. Beach was put in touch with Paul Reisinger,

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[11] A July 12, 1982, memo from Edward M. Lee, Jr., District Engineer, states:

> Provided the statute's 50 year requirement is met, the District is of the opinion that the 1958 Act does not preclude the establishment of definitive contractural [sic] repayment dates which may not necessarily correspond to the actual dates of demand.

[12] Memo from Gary R. Lord, Deputy Commander, South Pacific Division, Sept. 13, 1982; Memo from Brigadier General Gay, Sept. 30, 1982.

special counsel to the minority for the Public Works & Transportation Subcommittee of the House Appropriations Committee. Following contacts between Beach and Reisinger, and Reisinger and Gianelli's staff, an internal Corps decision was made to expedite the contract.

On September 9, 1982, Gianelli issued a memo ordering that the contract be expedited for his approval, and on October 1, 1982, he signed the contract.

II.

PRIOR PROCEEDINGS

Hagood, following his retirement from the Corps, filed this qui tam action on March 22, 1988, originally naming as defendants two Corps officials as well as the Water Agency. After the district court dismissed the individual defendants, and Hagood filed his third amended complaint, the district court dismissed the case for failure to state a claim. This court reversed and remanded, holding that the complaint stated a claim under the False Claims Act. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991) ("*Hagood I*"). After a period of discovery, the Water Agency moved for summary judgment. The district court granted the motion, and Hagood timely appealed.

III.

JURISDICTION UNDER THE FALSE CLAIMS ACT

[1] We review de novo the lower court's jurisdictional determination. *Hoeck v. City of Portland*, 57 F.3d 781, 784 (9th Cir. 1995), *cert. denied*, ____ U.S. ____, 116 S.Ct. 910 (1996). However, we accept the factual findings underlying such determination unless they are clearly erroneous. *United States ex rel. Barajas v. Northrop Corp.*, 5. F.3d 407, 409 n.5 (9th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1543, 128 L.Ed.2d 195 (1994). Hagood bears the burden of establishing jurisdiction, and all other essential elements of his claim, by a preponderance of the evidence. 31 U.S.C. § 3731(c); *Barajas,* 5 F.3d at 409 n.5.

A. *The Fixed Repayment Schedule Claim*

The district court declined to reach the merits of Hagood's claim that the fixed repayment schedule in the 1982 contract amounted to a false claim. The court held that its exercise of jurisdiction over his claim was barred by the public disclosure provision of the False Claims Act. According to that provision:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4). The district court held that this provision deprived it of jurisdiction over Hagood's fixed repayment schedule claim because "it is undisputed that the allegation that a fixed repayment schedule violated the Water Supply Act was publicly disclosed in the administrative proceedings and litigation brought by Ukiah."

Hagood primarily contends that the district court erred in its public disclosure determination because (1) Ukiah did not actually allege fraud as he does; (2) there was no actual fraud on the government until the Water Agency began using the storage space without initiating repayments, which did not occur until after the Ukiah litigation was over; and (3) he was the first to allege improper political pressure in aid of the false claim.

[2] Before turning to these contentions, we must dispose of Hagood's secondary contention, which is based on the law of the case. Hagood argues that the law of the case prohibited the district court from questioning its jurisdiction, as this court had already ruled in favor of jurisdiction in *Hagood I*. This contention lacks merit. The previous panel addressed only the cost allocation claim, never the fixed repayment claim: "According to the allegations of the complaint, the Water Agency 'used pressure and influence' to expedite [the contract's] signing without accurate and current cost allocations." *Hagood I*, 929 F.2d at 1418. Indeed, Hagood's fixed repayment schedule claim was not clearly stated even in his third amended complaint. That claim began to take precise shape only on remand, in his opposition to the Water Agency's summary judgment motion before us now.

In addition, there is now, at the summary judgment stage, significant new evidence bearing on the jurisdiction issue that was not before the previous panel on the 12(b)(6) motion to dismiss. The new evidence, discussed below, warranted reconsideration of the question by the district court on remand. *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989).

1. *Allegations of Fraud.*

This court has held that to raise the jurisdictional bar, the public disclosure must be of "allegations or transactions," as opposed to mere information. *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). The *Wang* court found there was public disclosure where the qui tam suit was "supported by a few factual assertions never before publicly disclosed; but 'fairly characterized' the allegation repeats what the public already knows." *Id.* at 1417; *see also United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) ("Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain."). Thus, the jurisdictional bar may be raised by public disclosure unaccompanied by an explicit allegation of fraud.

[3] In this case, there was public disclosure during the Ukiah proceedings of allegations that the fixed repayment schedule violated the Water Supply Act.[13] In the course of the FERC proceedings, Ukiah learned of the proposed amended contract between the Water Agency and the Corps, and argued that it would improperly allow the Water Agency to withdraw water without initiating the repayment obligation under the Water Supply Act. Indeed, Ukiah all but accused the Water Agency of fraud in its letters to the Corps, which it also filed with the FERC.[14]

[4] When Ukiah lost in the FERC proceedings, it submitted a petition for review in the D.C. Circuit Court of Appeals. Although the controlling issue was whether the Act required initiation of repayment on first use of the water for hydropower generation, a nonconsumptive purpose, rather than for water supply, a consumptive purpose, Ukiah based its argument on both. *See City of Ukiah,* 729 F.2d at 797 n.12 ("Ukiah also argues that the 1982 contract is illegal under the Water Supply Act because the contract separates Sonoma's repayment obligation from its use of water even for water supply purposes."). An issue need not be decided in prior litigation for the public disclosure

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[13] That documents filed with an agency or court during administrative proceedings or civil litigation are considered publicly disclosed is a firmly established principle. *See United States v. Northrop Corp.*, 59 F.3d 953, 966 (9th Cir. 1995) (" 'every court of appeal to have addressed the question' has held that 'any information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing of [sic] the purposes of section 3730(e)(4)(a)' ") (quoting *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir.), *cert. denied*, _____U.S._____, 115 S.Ct. 316 130 L.Ed.2d 278 (1994)).

[14] The record contains, for example, these complaints by Ukiah: "Ukiah also protests Sonoma's attempt to avoid its repayment obligation under the Water Supply Act of 1958, 43 U.S.C. 390b." And again: "Sonoma's intent in negotiating a revised contract is clearly to receive the benefit of the water stored at Warm Springs without paying for it in accordance with the express directive of the Congress."

bar to be triggered; rather, its mere disclosure suffices. *See Northrop Corp.*, 59 F.3d at 966.

[5] Nor has Hagood shown that he is an "original source" of Ukiah's allegations. *See Hagood I*, 929 F.2d at 1420 (original source inquiry triggered only upon finding of public disclosure). To be an original source, one must (1) have direct and independent knowledge of information on which the allegations are based; and (2) have voluntarily provided the information to the government before filing the action. 31 U.S.C. § 3730(e)(4)(B); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 743 (9th Cir. 1995) (en banc), *petition for cert. filed*, 64 U.S.L.W. 3642 (U.S. Mar. 11, 1996) (No. 95-1445). In other words, " 'one must have had a hand in the public disclosure of allegations that are a part of one's suit.' " *Barajas*, 5 F.3d at 410 (quoting *Wang*, 975 F.2d at 1418). Hagood has made no showing that Ukiah's knowledge of the repayment schedule or allegations of its illegality stemmed in any way from Hagood's internal complaints about the contract. Indeed, Hagood's internal complaints in 1981 and 1982 did not mention the fixed repayment schedule issue. Therefore, he was not an original source of this disclosure.

2. *Fraud Based on Actual Use.*

[6] Hagood, in an attempt to narrow the focus of his claim, contends that the district court's jurisdictional ruling cannot apply to his claim that the Water Agency's fraud began only when it actually used water "because the relevant facts as to the actual water usage without repayment did not occur until after the project had been placed in operation."[15]

Obviously the Water Agency's actual use of water from Lake Sonoma in 1987 or 1988 could not have been disclosed

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[15] Hagood's claim concerning actual use of the water did not emerge until he filed a brief opposing the Water Agency's motion for summary judgment. However, the district court was correct in reaching the claim, in effect treating it as a request to amend the pleadings. *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1524 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3593 (U.S. Feb. 15, 1996) (No. 95-1340).

during the Ukiah proceedings in 1982. However, documents filed in those proceedings acknowledged that the Water Agency would be able to do so:

> As to the County having the ability to release water prior to the contractually designated demand dates for the various blocks, and not be obligated to commence repayment for such releases until the contractually designated dates, the District agrees that such a situation could occur under the proposed amended contract. It could also occur that the "Water Agency" will begin repayment for one or more of the blocks of storage *before* demand is actually made for such storage. However, the District contends neither such occurrence would be in violation of the 1958 Water Supply Act.[16]

An October 3, 1982, article in the Santa Rosa *Press Democrat* also publicly reported the Water Agency's announcement that "the new plan will allow the county to use as much water as it needs as soon as Lake Sonoma is filled, without triggering a higher payment schedule that was called for under the old agreement."

Thus, the public was alerted in 1982 that the new contract embraced the possibility that the Water Agency might begin using water from the Warm Springs project before commencing repayment. Hagood's claim now that the Water Agency did *in fact* begin using the water without making payments amounts to no more than a new factual assertion, which when " 'fairly characterized' . . . repeats what the public already knows." *Wang*, 975 F.2d at 1417.

Hagood seeks to negate the effect of the contract by arguing that the Water Agency cannot rely on it to escape its obligation to begin repayments when it first uses the water. In this he is wrong. As the district court correctly observed, "unless the contract itself constitutes a false claim, Defendant may properly rely

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[16] Memo from Edward M. Lee, Jr., San Francisco District, to Commander, South Pacific Division, Aug. 16, 1982.

upon it." Short of offering evidence that the Water Agency's use of the water violated its contract with the Corps,[17] Hagood cannot base jurisdiction on this claim, which "rests on the same foundation as Plaintiff's other repayment claims."

3. *Improper Political Pressure.*

[7] Hagood contends that he is the first to allege that the Water Agency procured the favorable repayment contract through improper political pressure. This is true. However, ordinary political pressure, without more, is not a wrong. To the extent it is more, it rests, like the actual use claim, on the same foundation as does his claim that the fixed repayment schedule violates the Water Supply Act. With that claim barred by section 3730(e)(4), Hagood's allegations concerning improper political pressure are also barred.

4. *Conclusion.*

Hagood is not a whistleblower with respect to his fixed repayment claim. Through the Ukiah litigation and media reports, the public was made aware in 1982 that the Water Agency and the Corps had negotiated a repayment contract that allowed the Water Agency to begin using water before it began paying for it. Had Hagood raised this issue in his 1981 and 1982 memoranda before he left the Corps, he would have been in a better position to bring this claim. However, he did not. As we stated in *Wang:*

> If, however, someone *republishes* an allegation that already has been publicly disclosed, he cannot bring a

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[17] At oral argument, Hagood did indeed seem to argue that the Water Agency was improperly using water from Lake Sonoma for consumptive purposes and hiding this use from the Corps. There is no evidence to support this contention. There is evidence that the contract allows the Water Agency to use water for consumptive purposes, and that it is the Corps which controls the gates that release water from the reservoir. For example, Beach stated in a declaration: "The procedure for making these releases was to request a release from Corps personnel who would then make any releases from the dam."

> *qui tam* suit, even if he had "direct and independent knowledge" of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it.

Wang, 975 F.2d at 1419 (citing S. Rep. 345 at 6, *reprinted in* 1986 U.S.C.C.A.N. at 5271).

B. *The Cost Allocation Claim*

Hagood fares better as a "whistleblower" with respect to the issue of the cost allocation. The Corps memoranda which the Water Agency filed with the FERC during the Ukiah proceedings revealed the debate within the Corps over the cost allocation issue. Those filings may be enough to constitute public disclosure of the cost allocation issue.

[8] However, even if they were, Hagood was an original source of the allegation.[18] Hagood's complaint about the cost allocation began as early as November 1981, while Ukiah's letters were not filed in the FERC proceedings until July 1982. Moreover, as a Corps attorney he had worked a great deal on the Warm Springs Dam project and was in a position to know its specifications and costs. Because he learned of information relevant to the issue independently of its public disclosure, the first prong of the original source test, direct and independent knowledge, is met. *See Wang*, 975 F.2d at 1417.

He also meets the second prong of the original source test, as he voluntarily provided his superiors in the Corps with an explanation of why he thought a new cost allocation was legally

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[18] The original source test is often treated as the focus of the jurisdictional inquiry, with courts treating the "based upon public disclosure" step as a " 'quick trigger to get to the more exacting original source inquiry.' " *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 568 n.10 (11th Cir. 1994) (quoting *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951, 113 S.Ct 1364, 122 L.Ed.2d 742 (1993)).

required.[19] Although Hagood was not the only Corps employee to argue that a new allocation was needed, "[a]nyone who helped to report the allegation to either the government or the media would have 'indirectly' helped to publicly disclose it." *Wang,* 975 F.2d at 1419. Therefore, disclosure was at least partially based on records resulting from Hagood's complaints, and the district court correctly held that he was an original source. The jurisdictional bar of section 3730(e)(4) did not preclude this claim. Thus, we must address the issue whether what Hagood now reveals was knowing fraudulent behavior directed at the United States by the Water Agency.

IV.

SCOPE OF THE FALSE CLAIMS ACT

We review de novo the grant of summary judgment on the cost allocation claim. *Jesinger v. Nevada Fed. Credit Union,* 24 F.3d 1127, 1130 (9th Cir. 1994). We approach this issue mindful

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[19] This case is not controlled by our recent decision in *Fine,* 72 F.3d at 741, in which we held that an internal government auditor whose job was to expose fraud did not "voluntarily" provide information for the purpose of qualifying as an original source. Hagood's job was not to expose fraud, but to draft contracts and perform other legal services for the Corps. We acknowledged in *Fine* that the question "whether federal employees might be excluded as a class from qualifying as original sources" remained "for another day." *Id.* at 744 n.5; *see also United States ex rel. Williams v. NEC Corp.,* 931 F.2d 1493, 1501 (11th Cir. 1991) ("nothing in [section 3730(e)(4)(A)] operates to preclude *every* government employee from bringing a *qui tam* action based upon information acquired in the course of his government employment").

of the principles governing the granting of summary judgment, which are set forth in the margin. [20]

The gist of Hagood's cost allocation claim is that

> [The Water Agency] decided to seek the influence of others to avoid current cost allocation . . . . These events set into place by [the Water Agency] resulted in violation of 31 U.S.C. § 3729(a)(6) and § 3729(a)(7) . . . In this case, [the Water Agency] had a critical role in inducing the Army Corps to rely on information which [the Water Agency] had reason to know was false.

According to the named provisions of the False Claims Act,

> Any person who—
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> . . .
>
> (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government . . . who lawfully may not sell or pledge the property; or
>
> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government;
>
> is liable to the United States Government . . . .

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[20] Summary judgment is appropriate if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact. Once the movant has made this initial showing, the burden shifts to the other party to present sufficient evidence on which a reasonable jury could find for him, on each element of the claim on which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 252, 106 S.Ct 2505, 2512, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630-32 (9th Cir. 1987).

31 U.S.C. §§ 3729(a)(6)-(7). Thus, a violation of the False Claims Act requires scienter.[21]

A. *Falsity of the Cost Allocation.*

[10] To support an inference of falsity, Hagood observes that the cost allocation in the 1982 contract is based on the same source data as the cost allocation in the 1964 contract despite the expansion and change in design. He also argues that the original allocation was based on a 10-year deferral of water supply benefits and thus a 10-year discounting, whereas the new contract contains at most an 8-year deferral; therefore the percentage of costs allocated to water supply should now be higher.

The evidence concerning the shortened deferral period consists entirely of the 1974 exchange of correspondence between A. M. Clavelli of the General Accounting Office and Col. Lammie of the Corps. [22] These do support an inference that the cost allocation was no longer accurate.

The evidence supporting his expansion and change-of-design argument consists of several Corps memoranda, particularly the one from Brigadier General Gay to Assistant Secretary Gianelli, accompanying the final contract:

> The cost allocation for this project was approved in November 1969. At that time, the benefit breakout was 42% flood control, 27% water conservation, and 31% recreation. The FY 83 justification statement indicates this benefit breakout to the authorized purposes is currently 55% to flood control, 34% to water supply and 11% to general recreation and fish and wildlife.

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[21] "For a *qui tam* action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing fraud." *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995), *cert. denied*, ____U.S.____, 116 S. Ct. 700, 133 L.Ed.2d 657 (1996).

[22] See supra note 5.

This observation supports an inference that the cost allocation in the amended contract was no longer current. However, General Gay went on to recommend approval, and an accompanying note explained that the update was required by Corps policy, which was being waived. Thus, Hagood's evidence supports an inference that the allocation was imprecise, but not that it was false.

The language of the Water Supply Act concerning allocation of costs among project purposes provides the relevant government officials with fairly wide discretion:

> [T]he cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share *equitably* in the benefits of multiple purpose construction, *as determined by the Secretary of the Army* or the Secretary of the Interior, as the case may be . . . [B]efore construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions . . . [23]

43 U.S.C. § 390b(b) (emphasis added).

How precise and how current the cost allocation needed to be in light of the statute's imprecise and discretionary language was a disputed question within the Corps. Even viewing Hagood's evidence in the most favorable light, that evidence shows only a disputed legal issue; that is not enough to support a reasonable inference that the allocation was *false* within the meaning of the False Claims Act.

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[23] Neither the Corps nor the Bureau of Reclamation has promulgated regulations interpreting this statute. Rather, the Corps developed internal guidelines to inform its own decisionmaking.

B. *Knowledge of Falsity.*

[11] Nor does his evidence meet the scienter requirement of the Act. To establish the type of scienter so required, a relator must show:

> that a person, with respect to information—
>
> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information,
>
> and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b); *see also Wang,* 975 F.2d at 1420; *Hagood I,* 929 F.2d at 1421 ("The requisite intent is the knowing presentation of what is known to be false."). No such showing has been made. As this court held in Hagood's prior appeal, "[t]o take advantage of a disputed legal question, as may have happened here, is to be neither deliberately ignorant nor recklessly disregardful." *Hagood I,* 929 F.2d at 1421.

Nor has Hagood presently shown any reason to depart from this view. He argues that Beach, the Water Agency's general manager, was sophisticated enough to know that the altered project required an updated cost allocation. In support, he submits a December 14, 1982, memo from Beach to the Sonoma County Administrator discussing a cost-sharing proposal between the federal government and the Water Agency related to recreation facilities at Lake Sonoma. In that memo, Beach stated:

> The cost allocation for the project was made in 1967 pursuant to 43 U.S. 390(b) [sic]. The removal of recreation facilities from the federal project would require a reallocation based on current project costs which could result in a substantial increase in the Agency's repayment obligation . . . . This is on top of any increases

> which would result from a reallocation based on actual costs rather than 1967 estimates of cost.

This statement indicates that Beach knew that removing an entire project purpose from the existing cost-sharing contract might require a cost reallocation, and may support a reasonable inference that Beach was sophisticated. However, to jump from there to the conclusion that Beach knew that the cost allocation in the 1982 contract was false is a leap the evidence does not support.

Nor does Hagood's other evidence in the record supply the required knowledge. In the 1974 Pape letter, the Water Agency was told *by the Corps* that no new allocation would be performed. The deposition testimony by Beach's predecessor, Gordon W. Miller, also does not establish the required knowledge. Asked whether he would expect the allocation to change after the project was "optimized," Miller replied, "Not necessarily . . . . It would depend on how [the Corps] applied the Water Supply Act of 1958 to it . . . . [I]t could be subject to change. I do not recall that it was ever changed." Miller explained: "The allocation of costs was determined by the Corps, and if I asked somebody to do an analysis, I would have him use the cost percentages as allocated by the Corps." We can now say, as we could not on the basis of the complaint alone, "that the Water Agency did merely what the Corps bid it do." *Hagood I*, 929 F.2d at 1421. Clearly, Hagood's evidence does not support a reasonable inference that the Water Agency caused the Corps to rely on such information as was before it to make the decisions it made.

[12, 13] The False Claims Act, to repeat, requires a showing of knowing fraud. " 'The requisite intent is the knowing presentation of what is known to be false,' as opposed to innocent mistake or mere negligence. 'Bad math is no fraud,' proof of mistakes 'is not evidence that one is a cheat,' and 'the common failings of engineers and other scientists are not culpable under the Act.' The statutory phrase 'known to be false' 'does not mean "scientifically untrue"; it means "a lie" ' " *Anderson*, 52 F.3d at 815-16 (citations omitted). Likewise, the statutory phrase

"known to be false" does not mean incorrect as a matter of proper accounting methods, it means a lie.

Hagood's evidence does not suggest that the Water Agency lied; it suggests only that the Water Agency knew that *the Corps'* responsibility with regard to allocating costs was not clear, and that the Corps might exercise its authority in a number of ways. At most, Hagood has shown that the Water Agency took advantage of a disputed legal issue. This, as we have previously held, is not enough.

C. *Improper Political Pressure.*

[14] Hagood again refers to political pressure as part of his cost allocation claim. He offers evidence that Beach asked Congressman Claussen for help in getting the contract approved; that after Claussen's assistant met with Corps officials, those officials decided to expedite contract approval; and that because of the expedition, there was no time to prepare a new cost allocation.[24] This chain of events supports a reasonable inference that the Water Agency used political pressure to obtain the contract's approval. It does not establish that the contract so approved was a false claim. Perhaps Congressman Claussen did

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[24] As the district court observed, the only tangible evidence indicating that the Water Agency may have objected to the preparation of a new allocation was a memo written by a Corps official stating that locals would not support the project if their share of the cost increased. The district court ruled this was likely hearsay; that funding was not an abuse of discretion. *See Larez v. City of Los Angeles*, 946 F.2d 630, 641 (9th Cir. 1991) (hearsay ruling reviewed for abuse of discretion). The Water Agency, for its part, submitted a declaration by Beach stating:

> I have never expressed any opposition to the preparation of a new cost allocation for the 1982 water supply contract between [the Water Agency] and the United States of America . . . . I have never had any discussions with anyone connected with Congressman Claussen's office, Mr. Gianelli, Mr. Dawson, Colonel Bauchspies, or Neil Saling concerning the issue of a new cost allocation . . . . I never told anyone connected with Congressman Claussen's office, nor anyone connected with the Corps, that the [Water] Agency had a deadline for execution of the final contract.

influence the manner in which the Corps officials exercised their discretion. Perhaps not. In either event, there was no false claim within the meaning of the False Claims Act, 31 U.S.C. §§ 3729-3733.

To vest executive branch officials in a democratic government with discretion in the exercise of their powers is to invite the representatives in the legislative branch of those to be affected by its exercise to present vigorously their constituents' views to such officials. To expect it to be otherwise is foolish; to require it to be otherwise would be tyranny.

IV.

CONCLUSION

Hagood has presented persuasive evidence that the Corps, in its management of the Warm Springs Dam project, may have been wasteful, or too eager to build the dam, or been given too much discretion by the statutes governing its operations. He has not, however, established a violation of the False Claims Act by the Sonoma County Water Agency.

The judgment of the district court, including its award of costs to the Water Agency, is AFFIRMED.

KLEINFELD, Circuit Judge, concurring:

I concur in the result, and in the majority's reason, that what Hagood revealed was not fraud.

We err, I think, in deciding that Hagood was an original source who voluntarily provided the information. He was a lawyer charged with the duty of drafting a contract and other documents for the transactions at issue. If he thought the transaction was fraudulent, he was "required to give an honest opinion" to his client, and "may not knowingly assist a client in criminal or fraudulent conduct." Model Rules of Professional Conduct Rule 1.2 cmt. 6 (1995). *See also* Rules of Professional Conduct of the State Bar of Cal. Rule 3-210 (1995) (stating that "[a] member shall not advise the violation of any law . . . unless the member

believes in good faith that such law . . . is invalid"). These professional obligations made disclosure to his agency of fraud mandatory, not voluntary. Therefore, *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 741 (9th Cir. 1995)(en banc), controls, and prevents qui tam recovery.

In *Fine*, we held that an internal government auditor whose job was to expose fraud did not "voluntarily" provide information. *Id.* at 743-44. The majority states that our decision is not controlled by *Fine* because we rejected Fine's argument that since *all* federal employees labor under a duty to report fraud against the government, treating his disclosure as involuntary would "bar all federal employees from the universe of potential original sources." *Id.* at 744. In *Fine*, we said that the question "whether federal employees might be excluded as a class from qualifying as original sources" remained "for another day." *Id.* at 744 n.5.

The issue here is distinct from whether a government lawyer who discovers a fraud in a matter unrelated to his own duties can recover in a qui tam action. Had Hagood heard from a carpool acquaintance about a fraud in some other agency, then the question we left for another day in *Fine* would be before us. But a lawyer working on a transaction has a duty as an agent to disclose to his principal "information relevant to matters within his province and of which he should know the principal would want to know." Warren A. Seavey, *Law of Agency* § 143 (1964). Because Hagood provided the information to his agency pursuant to his legal duty, he did not do so "voluntarily," as 31 U.S.C. § 3730(e)(4)(B) requires for qui tam jurisdiction. Hagood "no more voluntarily provided information to the government than we, as federal judges, voluntarily hear arguments and draft dispositions." *Fine*, 72 F.3d at 743-44.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel. JAMES M. HAGOOD, *Plaintiff,* v. SONOMA COUNTY WATER AGENCY, *Defendant.*	No. C-88-0991 CW ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this False Claims Act action, Plaintiff James M. Hagood sues the Sonoma County Water Agency for the benefit of the United States. He alleges that the contract between Defendant and the Army Corps of Engineers establishing payments due from Defendant for the construction of the Warm Springs Dam constitutes a false claim for two reasons. First, the payment schedule contained in the contract allegedly violates federal law by failing to require that payments begin upon Defendant's first use of the Dam. Second, Plaintiff alleges that the amount of the cost allocated to Defendant is too low and was based on information known by Defendant to be false.

Defendant's motion for summary judgment was heard by this Court on March 3, 1995. Having considered all the papers filed and arguments made by the parties, and good cause appearing, the Court hereby GRANTS the motion for the reasons stated below.

A. *Statement of Undisputed Facts and Procedural History*

This qui tam action concerns the Warm Springs Dam, authorized by the Flood Control Act of 1962. The dam was intended to serve the multiple purposes of water supply storage,

flood control and recreation. It was originally planned to have a total storage capacity of 277,000 acre feet (AF).

In 1964, Defendant Sonoma County Water Authority (SCWA), then the "Sonoma County Flood Control and Water Conservation District," entered into a water supply contract with the Army Corps of Engineers (Corps) for use of the water supply storage component of the Warm Springs Dam. In that contract, SCWA agreed to repay that portion of the costs of building the dam which was allocated to water supply storage by the Corps, which was then set at approximately 30% of the total costs. The contract divided the water supply component of the reservoir into three separate storage blocks, with SCWA's repayment obligation starting in 1979, 1985 and 1991, respectively, for the three blocks. The estimated cost to be repaid by SCWA was $12,433,500.

In 1967, the Corps decided to increase the total storage capacity of the reservoir. The Corps informed SCWA that the share of costs allocated to SCWA was reduced to approximately 25% and estimated that SCWA's allocated cost would be increased to approximately $20 million. SCWA agreed that increased storage was desirable. The Board of Directors of the SCWA wrote the Corps that:

> At such time as cost figures can be firmed up, a formal resolution authorizing the District to enter into an amended contract under provisions of the Water Supply Act of 1958 will be considered by the Board to guarantee repayment of financing of the added water supply storage, with the understanding that such additional yield would be a fourth block of water under the contract.

The Corps reported the enlargement to Congress.

On October 17, 1974, the Corps provided SCWA with a revised estimate of SCWA's share of cost of the project of

approximately $160 million.[1] On October 24, 1974, H.E. Pape, the Chief of the Engineering Division of the San Francisco District of the Corps (District), wrote SCWA informing it that the percentage of costs allocated to the water supply function of the project would be 27.75% of the total cost. The letter stated that "this percentage will remain unchanged regardless of any changes made in the project's first cost."

In 1978, the Corps, SCWA and the California Department of Fish and Game met and discussed conjunctive operation of the Coyote Valley Dam (also known as Lake Mendocino) and the Warm Springs Dam (also known as Lake Sonoma) to maintain minimum flows into the Russian River. SCWA prepared a draft operational agreement for such conjunctive operation. The Corps reviewed the draft agreement and notified SCWA that it would be directed to begin making repayment on the Warm Springs Dam contract:

> when it is shown that SCWA's existing sources of water from the Russian River, including that stored in Lake Mendocino, are inadequate to provide for all legal beneficial uses along the Russian River . . . or when the time limits specified in the contract are reached. To see if existing supplies of water are adequate, the Corps will perform a monthly water supply routing of the Russian River system, assuming that Lake Sonoma was not in existence, at the end of every calendar year. When the routing indicates that Lake Mendocino would have been drawn down below the bottom of the water supply pool at the end of any month, SCWA will be directed to commence full repayment . . . .

A description of a proposed methodology for the water supply routing was attached.

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[1] This substantial increase was due in part to delays and in part to changes in design required by seismic considerations.

On October 1, 1980, Robert F. Beach, General Manager of SCWA, proposed to the Corps by letter that this or a similar methodology for determining the date of "first use" triggering commencement of the repayment obligation be included in an amended contract which would include the increased storage space not covered by the original 1964 agreement. On November 5, 1980, Beach met with Captain Scott Mosely and other members of the District to discuss an amended contract. Following that meeting, Beach wrote to Colonel Bazilwich, District Engineer, proposing "first use" language. The letter stated that the language was intended to "make it clear that the coordinated operation of the Coyote Valley and Warm Springs Dam projects . . . would not result in the premature triggering" of SCWA's repayment obligation. This draft language was not adopted.

In 1981, Mosely sought guidance from the Office of the Chief of Engineers (OCE) regarding the new contract. On May 22, 1981, the OCE sent an advice letter stating that a new cost allocation would be required in light of the increase in capacity. The letter further advised that although an amended contract covering all four blocks of storage was desirable to the government, a new contract for the original three blocks of storage probably could not be imposed on SCWA, in which case a supplemental contract for the fourth block of storage would be needed; in either event, each block of storage was entitled to a 50-year payout period. The letter specified that it did not constitute "official Office, Chief of Engineers, views."

It appears that no final agreement as to methodology of determining "first use" was ever reached. Apparently as an alternative, SCWA prepared studies to determine "estimated first use" dates and provided the study results to Corps hydrologists in September, 1981. The study results were incorporated into a proposed amended contract prepared by SCWA. The draft contract based repayment on the 27.76% cost allocation specified by the Corps in the 1974 Pape letter, and provided separate 50-year repayment schedules for each of the four blocks of storage.

On October 9, 1981, Beach met with Mosely and Plaintiff Hagood, who was then an assistant district counsel to the District and was assigned to the renegotiation of the Warm Springs Dam Water Supply contract with SCWA. Hagood or Mosely questioned the 27.76% cost allocation, and Beach cited the 1974 Pape letter. Following that meeting, Hagood discussed the cost allocation with the District's assistant chief of engineering and was "told, in no uncertain terms, that a cost allocation would not be done for the enlarged project" because of the commitment made by the 1974 Pape letter.

Plaintiff came to the conclusion that using the cost allocation stated in the 1974 Pape letter for the new contract would not comply with the 1958 Water Supply Act, 43 U.S.C. § 390b. Plaintiff so informed his supervisor, Colonel Bazilwich. Colonel Bazilwich decided to proceed with the cost allocations as proposed, and ordered Plaintiff to prepare the contract over Plaintiff's objections. On March 25, 1982, Plaintiff put this objection, and two others, into writing in a letter addressed to Colonel Bazilwich with copies to various other officers of the Corps.[2]

While the contract negotiations were proceeding, the City of Ukiah and SCWA submitted competing applications to the Federal Energy Regulatory Commission (FERC) to operate power plants at the Warm Springs Dam. SCWA argued that it would better be able to optimize power generation because it would have a contract with the Corps allowing it to make releases from the dam. Ukiah's attorneys contacted the Corps, expressing the opinion that such control over releases would accelerate SCWA's utilization and repayment obligation. The Corps agreed to allow Ukiah's attorneys to review and comment upon any draft contract. On February 10, 1982, FERC granted SCWA's application over Ukiah's.

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[2] Plaintiff also thought that a repayment term beyond 50 years after the project was put into operation and deferred payment of interest violated the Act.

On March 31, 1982, Colonel Bazilwich forwarded to the Corps' Chief of Engineers at the Engineering Division of the San Francisco District a proposed amended contract. The proposed contract explicitly provided that repayment would start on specified "expected usage start dates" rather than upon the actual first use and was accompanied by a statement of "Deviations and Justifications" which specifically set out that this was a deviation from the Corps' standard water supply contract format.

On April 5, 1982, the Corps' District Counsel prepared a memorandum for the files, disputing Plaintiff's legal opinion and expressing as the official opinion of that office that the proposed contract complied with the Water Supply Act. It noted that there were "valid arguments" on both sides of the issue of whether a new cost allocation was required, and stated that a provision had accordingly been added to the contract that if it were subsequently determined that a new cost allocation was required, it would be performed at a later date. This memorandum was also forwarded to the Engineering Division.

Sometime later during the month of April, Plaintiff left the District. He had no further involvement in these contract negotiations.

On May 28, 1982, the Engineering Division forwarded the proposed contract to the Corps headquarters. In the meantime, SCWA had asked Congressman Clausen to facilitate processing of the contract. Congressman Clausen in turn asked Bill Reisinger, Special Counsel to the Minority Public Works and Transportation Subcommittee of the House Appropriations Committee, to assist. Reisinger in turn contacted the Director of Civil Works at Corps headquarters requesting that the contract be moved forward expeditiously if appropriate.

In response to the inquiry as to whether moving the contract quickly was appropriate, the Corps' "Assistant Director of Civil Works, Pacific" stated in a memorandum that it was appropriate to move quickly, as the Corps had proceeded with construction without having consummated a contract. The

memorandum further recommended against requiring a new cost allocation, which would take six months, stating "if it comes out different, locals will not support."

On July 1 and July 9, 1982, Ukiah's attorneys wrote the Chief Engineer, objecting to the proposed contract on the grounds that it violated the Water Supply Act by having fixed repayment dates rather than "first use" triggering of repayment. Ukiah filed both letters with the FERC.

On August 16, 1982, the San Francisco District took the position that the fixed repayment dates would not violate the Water Supply Act, whether repayment started before or after actual "first use." The Engineering Division then took the position that the District had adequately responded to the issues raised by Ukiah and recommended approval of the draft contract.

In September 7, 1982, an attorney in the Corps' Office of Chief Counsel recommended that the District be required to explain why the date of "first use" could not be ascertained. He further suggested that the repayment provision be modified to provide for earlier repayment if a "first use" date earlier than specified in the contract was determined. This suggestion was endorsed by the OCE.

On or about September 8, 1982, SCWA manager Beach met with Corps headquarters personnel. He also met with House special counsel Reisinger, who asked for a short justification of the contract.

On September 9, 1982, the Assistant Secretary of the Army directed a memorandum to the Acting Director of Civil Works at Corps headquarters stating that it was "imperative" that the processing of the contract be completed by September 15, 1982, so that the contract would be ready for signing by local authorities soon thereafter. On September 15, 1982, Beach wrote to the District Counsel stating that because the "first use" methodology was both complex and likely to change, it could not be defined in the contract; it therefore was not feasible to revise the

repayment article of the agreement to provide that repayment would begin prior to the dates stated therein if a "first use" was determined. He recommended instead that the agreement be revised to add language reserving to the Corps the right "to prohibit any withdrawals of water . . . that would cause the repayment provisions of this contract to be inconsistent with any provisions of the Water Supply Act of 1958."

This proposed "savings clause" was accepted by the District and the Division. Brigadier General Gay presented the contract to the Assistant Secretary of the Army for signature, expressing the opinion that the Corps' regulations required an updated cost allocation, but stating that an "expedited schedule for review and approval" of the contract did not allow time for a new cost allocation. The proposed contract and General Gay's report were circulated at headquarters with a note stating that Corps "policy" required a cost allocation, but that it was "not a legal necessity" and that OCE staff had decided to "waive" the policy. The contract was signed without a new cost allocation on October 1, 1982.

Ukiah then requested rehearing before FERC, arguing that any releases from the blocks of storage before the fixed repayment dates would violate the Water Supply Act. Ukiah did not argue or attempt to show that the contract was procured through improper methods or based upon any false information. The application was denied, and Ukiah filed a petition for review in the United States Court of Appeals for the District of Columbia. That court held that the SCWA could direct releases for nonconsumptive uses without triggering repayment obligations under the Water Supply Act. *City of Ukiah v. FERC*, 729 F.2d 793 (D.C. Cir. 1984). The court's opinion expressly referred to the contractual provision for fixed repayment dates "regardless of when consumptive use begins." The fixed repayment schedule was also publicly disclosed on December 3, 1982 in *The Press Democrat.*

In March, 1988, following his retirement from the Corps, Plaintiff commenced the instant litigation. This Court dismissed Plaintiff's third amended complaint for failure to state a cause of

action on the grounds that no fraud could have been committed because the government officials had full knowledge of the facts which allegedly made the cost allocations in the contract false. The Ninth Circuit reversed, finding the complaint to be sufficient. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991).

The Ninth Circuit found in the complaint, reading it "generously," an allegation that the SCWA "played an active part in having presented for signature a contract that the Water Agency knew was based on false information." *Id.* at 1421. The fact that the government officials knew of the alleged falsity is not in itself a defense. *Id.* Rather, the controlling issue is whether Defendant knew of a falsity.

The court emphasized that for Plaintiff to prevail at trial, he would have to prove that the SCWA actually knew that the information was false, or had "deliberate ignorance" of or "reckless disregard" for the true facts. The court expressly held that "to take advantage of a disputed legal question, as may have happened here, is to be neither deliberately ignorant nor recklessly disregardful." *Id.*

The Ninth Circuit also permitted the United States to file a brief *amicus curiae* to raise an issue not raised or decided below. The United States argued that this Court lacked subject matter jurisdiction under 31 U.S.C. § 3730(e)(4), which provides in relevant part as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a . . . civil, or administrative hearing, in a . . . administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based

> and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

The government argued that Plaintiff was engaged in an administrative investigation while renegotiating the contract, and that he disclosed to himself as a member of the public the information on which he based his suit. The Ninth Circuit rejected this argument as "tortured" and "too metaphysical," and held that no "public disclosure" was made by Plaintiff to himself. *Id.* at 1419. Accordingly, there was no need for Plaintiff to show that he was the original source. *Id.* at 1420.

B. *Legal Standard*

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, or when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Eisenberg v. Insurance Co. of North America,* 815 F.2d 1285, 1288-89 (9th Cir. 1987). The moving party bears the burden of showing that there is no material factual dispute by demonstrating that there is an absence of essential evidence to support the opposing party's case. *Celotex,* 477 U.S. at 317.

The opposing party must show that there is evidence on which the jury could reasonably find in its favor. *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242 (1986). The Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex,* 477 U.S at 324; *Eisenberg,* 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Acc. & Indem. Co.,* 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify

which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

C. *Discussion*

1. *Subject Matter Jurisdiction*

This action is based upon two allegedly unlawful aspects of the contract between Defendant SCWA and the Corps, the cost allocation and the repayment schedule. If there was public disclosure of the relevant facts prior to the filing of this suit as to either of these claims, this Court lacks subject matter jurisdiction over the claim unless Plaintiff was an "original source" of that information. 31 U.S.C. § 3730 (e)(4).

Whether Plaintiff was an original source for such a public disclosure was not decided in *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d at 1419. The only subject matter jurisdiction issue decided there was whether Plaintiff's knowledge regarding the cost allocation should be deemed a public disclosure by his governmental self to his private self; the Court held it should not. In this motion, Defendant contends that it is undisputed there was actual public disclosure within the meaning of 31 U.S.C. § 3730(e)(4). Analysis of this contention requires examination of Plaintiff's precise allegations in this action.

With respect to the repayment schedule, Plaintiff alleges that SCWA "improperly used political pressure and influence to have the Contract signed, even though the SCWA knew that the Contract . . . contained a repayment schedule that was contrary to the requirements of the [Water Supply Act]," and that SCWA "knowingly started using water from the Warm Springs Dam for water supply without commencing repayment and . . . has been using the Contract, based on false information to . . . avoid its repayment obligation to the Government." Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment (Opposition), p. 11, l. 6-13. The knowledge of falsity alleged here is knowledge that the repayment schedule was violative of the Water Supply Act.

Putting aside the question of whether the violation of a statute constitutes "falsity," it is undisputed that the allegation that a fixed repayment schedule violated the Water Supply Act was publicly disclosed in the administrative proceedings and litigation brought by Ukiah. Ukiah's request for rehearing before the FERC expressly claimed that any releases from the blocks of storage before the fixed repayment dates would violate the "first use" repayment requirements of the Water Supply Act. The Court of Appeals for the District of Columbia specifically referred to the contractual provision for fixed repayment dates "regardless of when consumptive use begins" in its opinion. In addition, the fixed repayment schedule was further disclosed by the press.

Plaintiff does not claim that he was the original source of the allegation that the fixed repayment schedule violated the Water Supply Act, nor does the record contain any support for such a claim. Instead, Plaintiff argues that there was not full disclosure of the transaction which forms the basis for his claim because Ukiah did not allege that there had been fraud. However, a disclosure is sufficient to bar subsequent *qui tam* actions when the allegedly fraudulent transaction itself is disclosed, regardless of whether there is an actual allegation of fraud. *E.g., Wang v. FMC Corp.,* 975 F.2d 1412 (9th Cir. 1992) (public disclosure of transmission problems in Bradley vehicles sold to the government constituted disclosure of claim that the government contractor defrauded the government through selling defective vehicles).

Plaintiff further argues that Ukiah did not allege that the contract was procured through improper political pressure.[3] However, the claim that Defendant used improper political methods to promote the contract does not constitute an allegation of a false claim; rather a false claim allegation must be based upon the actual falsity of the contract itself or the basis for the

[3] As discussed below, the Court finds that Plaintiff has not proffered sufficient evidence of such improper political pressure and influence to create a triable issue.

contract. Evidence of improper political methods to procure the contract would be relevant only to support an inference that Defendant had knowledge of the falsity of the contract or its basis. The issue of whether or not Defendant had knowledge of an alleged falsity is not reached where, as here, the alleged falsity has already been publicly disclosed, and Plaintiff was not an original source of that disclosure.

Plaintiff finally argues that there has been no previous disclosure of the allegation that SCWA knowingly began using water from the dam in 1988 without commencing repayment, thereby using the contract to avoid its repayment obligations under the Water Supply Act. This is apparently the first time that even Plaintiff has raised this allegation. Assuming that this belatedly raised allegation is properly before the Court, it necessarily rests on the same foundation as Plaintiff's other repayment claims, that the contract is a false claim because it violates the "first use" repayment requirement of the Water Supply Act, for unless the contract itself constitutes a false claim, Defendant may properly rely upon it. Because the allegation that the contract constitutes a false claim is statutorily barred, however, it cannot serve as the basis for this secondary claim.[4]

Therefore, the Court lacks subject matter jurisdiction over Plaintiff's claim with respect to the repayment schedule. Summary judgment is granted to Defendant on that claim.[5] However, the Court finds that it does have subject matter jurisdiction over Plaintiff's claim with respect to the cost allocation.

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[4] The Court notes, in any event, that Plaintiff has made no showing that SCWA knowingly caused releases for consumptive purposes in 1988. Thus, even if this alleged fact were material, Plaintiff has failed to provide evidence to support it.

[5] The Court declines to impose sanctions on Defendant for failing to raise this jurisdictional issue previously. This issue of fixed repayment dates was not originally part of Plaintiff's claims. Further, Defendant claims that full document production by Plaintiff was not completed until August, 1994.

The only previous disclosure of the cost allocation aspect of the contract shown by Defendant is a disclosure by the Corps to Ukiah of records demonstrating that no new cost allocation had been performed. Assuming that this would constitute public disclosure, Defendant has not shown as a matter of law that Plaintiff is not an original source of the disclosure.

The information disclosed to Ukiah was based upon records generated as a result of Plaintiff's disclosure of the cost allocation issue to his supervisors and other Corps officials in the course of the contract negotiation and approval process. Further, the fact that the Corps persisted in its decision not to perform a new cost allocation after Plaintiff's personal involvement ended does not obliterate Plaintiff's direct and independent knowledge of the transaction. Therefore, the merits of the cost allocation claim must be reached.

2. *Cost Allocation Claim*

At trial, it would be Plaintiff's burden to prove that the cost allocation was based on false information and that Defendant SCWA knew of the falsity, or acted in deliberate ignorance or with reckless disregard of the truth or falsity of the information. *Wang*, 975 F.2d at 1420. Accordingly, to defeat summary judgment, Plaintiff must come forward with sufficient evidence to allow a finder of fact to find in his favor on these issues. *Id.* This he has not done.

Plaintiff misunderstands the burden of proof. He argues that "SCWA has not presented any evidence . . . that the cost allocation was true and correct." Opposition, p. 19, l. 7-9. However, it is Plaintiff who must make a showing that the cost allocation was false and that Defendant knew of the falsity.

It is undisputed that calculation of the cost allocation was the duty of the Corps and was in fact performed by the Corps. Plaintiff's argument that Defendant must have known that the cost allocation was false is based upon the premise that it must

have been inaccurate because it was based upon outdated information. However, no such necessary knowledge of falsity is shown.

The original allocation was altered after the 1967 decision to expand the dam's capacity was made. The 1974 Pape letter informing Defendant of the 27.6% allocation came seven years after the decision to expand the dam's capacity. Plaintiff can point to no reason why Defendant must have known that the allocation, modified after the plans for expansion were made, did not take the expansion into account, as Plaintiff now claims.

Furthermore, the Corps informed Defendant in 1974 that the 27.6% allocation was the final allocation. Plaintiff shows no reason why Defendant should not have relied upon that Corps communication.

Plaintiff is correct that Beach testified in his deposition to his understanding that the allocation used in the amended contract was based upon the same "source of data" as was the allocation in the 1964 contract. However, that the allocation was based on the same source of data does not mean that it was not recalculated, nor that it is necessarily incorrect.

Plaintiff attempts to meet his burden of showing that Defendant knew of the alleged falsity of the allocation by showing that Defendant opposed preparation of an updated cost allocation. However, the only evidence Plaintiff produces of such opposition is neither admissible nor probative. It consists of a statement in a memorandum of a Corps official that a new cost allocation would take six months, and that "if it comes out different, locals will not support." There is nothing in the memorandum to indicate the basis for the statement "locals will not support." As such, it lacks foundation. It may be merely speculation, lacking any probative value.

Plaintiff further argues that Defendant sought to avoid an updated cost allocation by forcing an expedited review of the proposed contract through use of improper political influence.

However, the only evidence proffered by Plaintiff that Defendant attempted to exercise improper influence is that Defendant asked its Congressperson to facilitate processing of the contract and met with the person designated by its Congressperson to assist it. This constitutes nothing more [than] the act of petitioning the government. Because of the First Amendment right to petition the government for redress of grievances, entities which engage in otherwise tortious conduct which constitutes such petitioning are immune from liability. *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 137 (1961) (conduct of trying to influence legislation cannot constitute violation of the Sherman Act, even though done with anticompetitive intent which would otherwise be illegal, because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.") It follows that something more than the protected act of petitioning the government must be shown to support an inference of improper conduct. Here, nothing more is shown.

Finally, the Ninth Circuit has expressly held in this case that Plaintiff must show more than "tak[ing] advantage of a disputed legal question" by Defendant. *U.S. ex rel. Hagood*, 929 F.2d at 1421. Plaintiff argues that he has done so because there is no dispute as to whether a new cost allocation was legally required. However, the record shows that there is a substantial dispute as to whether it was required. Several Corps officials concluded that the Corps was bound by the final allocation communicated in the 1974 Pape letter. Furthermore, a Corps headquarters memorandum states that a new cost allocation was not a legal requirement, but merely a waivable policy. Beyond his own legal opinion, Plaintiff cites no authority that a new cost allocation is required when there are changes to a project. Thus, Plaintiff has not made any showing that Defendant has done anything more than taking advantage of a disputed legal question.

Since Plaintiff has failed to proffer evidence which would support a finding that Defendant submitted a false claim by presenting the proposed amended contract to the Corps without

a new cost allocation having been performed by the Corps, summary judgment in favor of Defendant must be entered on the cost allocation claim.

D. *Order*

Therefore, for the reasons stated above, Defendant's motion for summary judgment is hereby granted. The clerk shall enter judgment for Defendant and shall close the file.

IT IS SO ORDERED.

Dated: May 11, 1995

/s/ CLAUDIA WILKEN

Claudia Wilken
United States District Judge

Copies mailed to counsel
as noted on the following page

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* JAMES M. HAGOOD, *Plaintiff,* v. SONOMA COUNTY WATER AGENCY, *Defendant.*	No. C-88-0991 CW JUDGMENT

This action came on for hearing before the Court, the Honorable Claudia Wilken, United States District Judge, presiding, and the issues having been duly heard and the Court having duly rendered its decision,

IT IS HEREBY ORDERED AND ADJUDGED:

That Plaintiff United States of America *ex rel* James M. Hagood take nothing, that the action be dismissed on the merits, and that Defendant Sonoma County Water Agency recover of Plaintiff United States of America *ex rel* James M. Hagood its costs of action.

Dated: May 11, 1995

/s/ CLAUDIA WILKEN
Claudia Wilken
United States District Judge

Copies mailed to counsel
as noted on attached sheet: